(18,626.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 398.

ANTOINETTE B. KINNEY AND CLESSON S. KINNEY, APPELLANTS,

vs.

THE COLUMBIA SAVINGS AND LOAN ASSOCIATION.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH.

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* * * * * * *

1&2 In the District Court of the Third Judicial District in and for the County of Salt Lake, State of Utah.

ANTOINETTE B. KINNEY and CLESSON S. Kinney, Plaintiffs,
vs.
THE COLUMBIA BUILDING AND LOAN Association (a Corporation), Defendant.
} No. 349. Complaint.

And now come the plaintiffs above named and for cause of action against the defendants, allege:

I.

That at all times hereinafter mentioned the defendant was and now is a corporation organized and existing under the laws of the State of Colorado.

II.

That on the 22nd of November, 1890, the plaintiff, Antoinette B. Kinney was the owner in fee of the following-described land and premises situate in the city and county of Salt Lake, then Territory, now State of Utah, to wit:

Commencing eight (8) rods east of the northwest corner of lot five (5) block thirty (30) plat "B," Salt Lake City survey, running thence south ten (10) rods; east two (2) rods; north ten (10) rods; west two (2) rods to the place of beginning, containing (20) squ. rods with strip of land six (6) feet wide and ten (10) rods long immediately adjoining said described land on the east side for private driveway, but reserving a strip of land six (6) feet wide and ten (10) rods long on the east side of said described property for private driveway, said driveway to be used only by parties immediately adjoining on the east and west of said driveway.

III.

That on or about the 1st day of November, 1890, these plaintiffs applied to the defendant corporation for a loan of the sum of twenty-five ($2500.00) hundred dollars.

3 IV.

That thereafterwards, these plaintiffs' application for said loan of twenty-five hundred ($2500.00) dollars was approved and the said sum was loaned to these plaintiffs by the said defendant, and the said plaintiffs were required to and did make, execute and deliver to the defendant corporation their promissory note, which was in words and figures in substance as follows:

"No. —. SALT LAKE CITY, UTAH, *November 22nd*, 1890.

On or before six years after date for value received we or either of us promise to pay to the Columbia Building and Loan Associa-

tion, at its office in Denver, Colo., twenty-five hundred ($2500.00) dollars, with interest and installments according to the by-laws of the association, payable on or before the 5th day of each and every month.

$2500.00. ANTOINETTE B. KINNEY.
CLESSON S. KINNEY."

V.

That on the 22nd day of November, 1890, said defendant advanced to these plaintiffs the said sum of twenty-five hundred ($2500.00) dollars and these plaintiffs made, executed and delivered to the said defendant their certain deed of trust or mortgage in writing to secure the promissory note herein set forth, which deed of trust was in words and figures as follows, to wit:

This indenture, made this twenty-second day of November, in the year of our Lord, one thousand eight hundred and ninety between Antoinette B. Kinney and Clesson S. Kinney, her husband, of the county of Salt Lake, and Territory of Utah, parties of the first part; and Clyde J. Eastman of the county of Arapahoe, and State of Colorado, party of the second part,

Witnesseth: That whereas, Antoinette B. Kinney and Clesson S. Kinney have executed their promissory note bearing even date herewith for the principal sum of twenty-five hundred ($2500.00) dollars, payable to the The Columbia Building and Loan Association, at its office in Denver, Colorado, on or before six years after date, with interest and installments thereon according to the by-laws
4 and rules of said association payable on or before the fifth of each and every month, or to be counted as principal,

And whereas, the said parties of the first part being desirous of securing not only the prompt payment of said promissory note, and the interest that may accrue thereon, in whose hands soever the same may be, but also to effectually secure and indemnify the said The Columbia Building and Loan Association, for or on account of any assignment, endorsement or guarantee of said note.

Now therefore, the parties of the first part, in consideration of the premises and for the purpose aforesaid, and in the further consideration of one dollar to them in hand paid by the party of the second part, the receipt whereof is hereby confessed, have and do grant, bargain, sell and convey unto the said party of the second part, in trust, forever, all the lands and premises situate in the county of Salt Lake and Territory of Utah, known and described as follows, to wit:

Commencing eight (8) rods east of N. W. corner of lot five (5) block thirty (30) plat "B" Salt Lake City survey, thence south ten rods; east two (2) rods; north ten (10) rods west two (2) rods to place of beginning containing twenty squ. rods, with strip of land six (6) feet wide and ten rods long immediately adjoining said described land on east side for private driveway, but reserving a strip of land six (6) feet wide and ten (10) rods long on east side of said described

property for private driveway, said driveway to be used only by parties immediately adjoining on the E. & W. of said driveway.

To have and to hold the same, together with all and singular the tenements, hereditaments, privileges and appurtenances thereunto belonging to the party of the second part, or upon his failure to act, to his successor in trust forever; in trust nevertheless, that in case of default in the payment of the said promissory note or any part thereof, or the interest or installments thereon, according to the tenor and effect of said note, or in case of the breach of any of the covenants or agreements herein mentioned, then on the application of the legal holder of said promissory note, or either of them,
5 to sell and dispose of said premises and all the right, title, benefit and equity of redemption of the said parties of the first part, their heirs and assigns therein at public auction, at the front door of the court-house in the county of Salt Lake, in the Territory of Utah, or on said premises, or any part thereof, as may be specified in the notice of such sale, for the highest and best price that the same will bring in cash, four weeks' notice having been previously given of the time and place of such sale, by advertisement in any newspaper at that time published in the county in which the above-described property is situated, and to make, execute and deliver to the purchaser or purchasers at such sale good and sufficient deed or deeds of conveyance, for the premises sold; and out of the proceeds or avails of such sale and the purchase-money paid thereon, after first paying all costs of advertising, sale and conveyance, including the reasonable fees and commissions of the said party of the second part, and all other expenses of this trust including all moneys advanced for insurance, taxes or other liens of assessments, with interest thereon at one per cent. per month, then to pay the principal of said note whether due and payable by the terms thereof or not, and interest due on said note up to the time of such sale, rendering the overplus (if any) unto the said parties of the first part, their legal representatives or assigns, on reasonable request (and it shall not be obligatory upon the purchaser or purchasers at any such sale to see to the application of the purchase-money) which sale or sales so made shall be a perpetual bar, both in law and equity, against the parties of the first part, their heirs and assigns, and all other persons claiming the premises aforesaid, or any part thereof by from through or under said parties of the first part or any of them.

And in case of any suit or proceedings at law or in equity *wherein* the said party of the second part by reason of his trusteeship under this deed, he shall be allowed and paid his reasonable costs, charges, attorneys' and solicitors' fees, in such suit or proceedings by the parties of the first part, and the same shall be a further charge and lien upon said premises under this deed, to be paid out of the proceeds of the sale thereof, as aforesaid, with interest thereon
6 at the rate of one per cent. per month, if not otherwise paid by said parties of the first part. And the said party of the second part, or his successor in trust, with or without readvertising, is hereby authorized and empowered to postpone or adjourn said

sale from time to time, or any length of time, at his discretion; and also to sell the said premises *en masse* or in separate parcels, as he may prefer to think best. And the parties of the first part for themselves and their heirs, executors and administrators, convenant and agree to and with the said party of the second part, and his successor in trust hereinafter named, that at the time of sealing and delivery of these presents they are well seized of said premises in fee-simple, and have good right, full power and lawful authority, to grant, bargain and sell the same in the manner and form as aforesaid; that the same are free and clear of all liens and encumbrances whatsoever.

And, the said parties of the first part will in due season pay all taxes and assessments on said premises, and at the request of the second party will keep all buildings that may at any time be on said premises, during the continuance of said indebtedness insured in such company or companies as the holder or holders of said note may from time to time direct; for such sum or sums as such companies will insure for, not to exceed the amount of said indebtedness, except at the option of the said parties of the first part, and will assign with proper consent of the insurers, the policy or policies of insurance to the said party of the second part, as further security for the indebtedness aforesaid. And in case of the refusal or neglect of the said parties of the first part, or either of them, thus to insure or assign the policies of insurances, or to pay such taxes or assessments, said party of the second part or his successor in trust or the holder of said note or either of them, may procure such insurance, or pay such taxes or assessments, and all moneys thus paid, with interest thereon, at one per cent. per month, shall become so much additional indebtedness, secured by this deed of trust and to be paid out of the proceeds of sale of the lands and premises aforesaid, if not otherwise paid by the said parties of the first part, and the said premises in the quiet and peaceable possession of the party of the second part or his successor in trust against all and every other person lawfully claiming or to claim the whole or any part thereof, the parties of the first part shall and will warrant and forever defend.

7

And it is stipulated and agreed, that in case of default in any of said payments of principal or interest, according to the tenor and effect of said promissory note aforesaid, or either of them, or any part thereof or of a breach of any of the covenants or agreements therein by the parties of the first part, their executors, administrators, or assigns, then, and in that case, the whole of said principal sum hereby secured, and the interest thereon to the time of sale, may at once, at the option of the legal holder thereof become due and payable, and the said premises be sold in the manner and with the same effect, as if the said indebtedness had matured.

And it is further agreed, and specially understood that in the case of the death, resignation, removal or absence from the county of Salt Lake or refusal or failure or inability of said party of the second part to act, then the then acting sheriff of Salt Lake county shall be and hereby is appointed and made successor in trust, of the

said party of the second part, and in such event the said land and premises shall become vested in such new trustee and all the power and authority by this indenture granted to the said party of the second part shall accrue to and be exercised by the said acting sheriff the same and to all intents and purposes as if he had been made the party of the second part herein.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

ANTOINETTE B. KINNEY. [SEAL.]
CLESSON S. KINNEY. [SEAL.]

Witness:
R. D. WINTERS.

8 TERRITORY OF UTAH, } ss:
Salt Lake County, }

I, R. D. Winters a notary public in and for said county, in the State aforesaid, do hereby certify that Antoinette B. Kinney and Clesson S. Kinney, her husband, who are personally known to be the persons whose names are subscribed to the foregoing deed, appeared before me, this day in person, and acknowledged that they signed, sealed and delivered the said instrument of writing as their free and voluntary act, for the uses and purposes therein set forth.

I further certify that my commission expired March 14, 1892. Given under my hand and notarial seal this twenty-second day of November, 1890.

R. D. WINTERS,
Notary Public.

Endorsement on back as follows:

No. — Columbia Building and Loan Association, Denver, Colo. Deed of trust. From Antoinette B. Kinney and Clesson S. Kinney to Clyde J. Eastman, for use of Columbia Building and Loan Association.

STATE OF UTAH, } ss:
County of Salt Lake, }

I hereby certify that this deed was filed for record in my office at — o'clock — m., November 22nd, 1890 and is duly recorded in Book "2 U" pages 288–291.

GEO. M. CANNON, *Recorder.*

6.

That said deed of trust was acknowledged and certified so as to entitle it to record and was recorded in the office of the county recorder of Salt Lake county, Utah, on the 22nd day of November, 1890, in Book "2 U" of Mortgages, on pages 288–291.

VII.

That these plaintiffs have paid to the said defendant on said loan and indebtedness seventy-one (71) payments of forty and
9 $\frac{63}{100}$ dollars (40.63) each on or about the fifth day of each month beginning January 1891, and ended November 1896;

also these plaintiffs have further paid to the defendant on said loan and indebtedness seven payments of seventeen and $\frac{50}{100}$ dollars ($17.50), on the months of July, August, Sept., Oct., Nov., and Dec., 1890 and for December 1896; and also on Dec. 2, 1893, $7.50, all in accordance with the by-laws and rules of defendant, which amounts these plaintiffs have requested the defendant to credit upon said note and deed of trust, but that defendant has refused to do so, just how said payments have been applied these plaintiffs do not know, but that plaintiffs allege that they are informed and believe that they have overpaid their indebtedness to defendant between five hundred and eight hundred dollars.

VIII.

That these plaintiffs are entitled to an accounting and a cancellation of said deed of trust, and a cancellation and delivery to them of the said promissory note.

IX.

That the said payments were made first to the said defendant at the banking-house of McCornick & Co., and afterwards to the Utah national bank, both in Salt Lake City, Utah, which bank was designated at different times by the defendant as the defendant's agent to collect the same. That none of the payments referred to were made in Denver, Colo. by said plaintiffs.

X.

That before bringing this action these plaintiffs demanded that the defendant cancel the said deed of trust, and cancel and deliver to them said promissory note but that the defendant refuses to do so.

XI.

That on or about the first day of April, 1898, these plaintiffs insured the buildings upon said premises for a period of three years, for the sum of $2500, and assigned *and* the said policy to said defendant. That the plaintiffs are entitled to have the assignment on said policy canceled and the said policy returned to them.
10 That they plaintiffs have demanded the cancellation of said assignment and the return of said policy to them, but defendant has refused to return the same.

XII.

That the defendant threatens to, and the *defendants* believe and therefore allege that it will, unless restrained by this court, advertise and sell the said property under the power of sale in said deed of trust.

XIII.

That if the defendant is permitted to advertise and sell the said property the plaintiffs will suffer great and irreparable damage and injury, and the property herein described will be clouded in title.

XIV.

That the sum of $300.00 is a reasonable attorney's fee in the premises.

Wherefore, the plaintiffs pray:

1st. That there be an accounting between the defendant and the plaintiffs, and that the plaintiffs have judgment against the defendant for any and all sums that may be found due them, upon said accounting.

2nd. That the deed of trust be cancelled and discharged of record by decree of this court.

3rd. That the said promissory note be cancelled by decree of this court and delivered to the plaintiffs.

4th. That the assignment on said insurance policy be cancelled and said policy be delivered to the plaintiffs.

5th. That the defendant be required to show cause why it should not be restrained from advertising or selling said property pending this action. That an order be made upon hearing thereon restraining the defendant pending this action from suffering or committing any of said acts, and that upon the conclusions of this case said restraining order be made permanant.

6th. For three hundred ($300.00) — attorneys' fees and costs of this suit.

7th. For such other and further relief as to the court may seem just in the premises.

RICHARDS & VARIAN,
Attorneys for Plaintiffs.

11 STATE OF UTAH, } ss:
County of Salt Lake, }

Antoinette B. Kinney being duly sworn on oath says: That she is one of the plaintiffs in the above-entitled action; that she verifies said complaint for and on behalf of both of the said plaintiffs; that she has read the above complaint and knows the contents thereof and that the same is true of her own knowledge except as to matters therein stated upon information and belief and as to those matters she believes it to be true.

ANTOINETTE B. KINNEY.

Subscribed and sworn to before me this 17th day of August, 1899.

AMEY SMITH,
Notary Public.

Endorsed: 2734. Title of court & cause. Filed August 25th, 1899. David C. Dunbar, clerk dist. court of Salt Lake county, Utah, by M. M. Liggan, deputy.

And afterwards, the following summons was issued by plaintiffs' attorney and served by the sheriff of Salt Lake county on said defendant August 24th, 1899. Said summons and the officer's return thereon being in words and figures following, to wit:

Summons.

The State of Utah to said defendant:

You are hereby summoned to appear within twenty days after the service of this summons upon you, if served within the county in which this action is brought, otherwise, within thirty days after service, and defend the above-entitled action; and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served upon you.

RICHARDS & VARIAN,
Plaintiffs' Attorneys.

P. O. address rooms Nos. 500 '1, '3 & '5 McCornich block, Salt Lake City, Utah.

12 STATE OF UTAH, } ss:
County of Salt Lake, }

I, John F. Howells, sheriff of the county of Salt Lake, State of Utah, do hereby certify and return, that I received the within and hereto-annexed summons on August 24th, 1899, and that I served the same on defendant named therein, to wit: The Columbia Building and Loan Association a corporation, by delivering to and leaving with Joseph Oberndorfer (the designated agent of said defendant corporation) personally at the city and county of Salt Lake, State of Utah, on August 24th, 1899, a true copy of said summons, together with a true copy of the complaint in said action thereto attached.

I further certify that at the time of the service of summons on the defendant corporation as aforesaid, I endorsed upon a copy of summons so served the date and place of service, signed my name and added my official title thereto.

Dated at Salt Lake City, Utah, this 24th day of August, 1899.

JOHN F. HOWELLS,
Sheriff of Salt Lake County, State of Utah,
By JOHN B. CUMMOCK,
Deputy Sheriff.

Sheriff's Fees.

Service	$1.00
Mileage	.20
Total	$1.20

Endorsed: Title court and cause. Summons. Filed Aug. 25, 1899. David C. Dunbar, clerk dist. court of Salt Lake county, Utah, by M. M. Liggan, deputy clerk.

Received sheriff's office Aug. 24, 1899, at 2 o'clock p. m.

JOHN F. HOWELLS,
Sheriff Salt Lake County, Utah.

13 And on September 2, 1899, a petition for removal from the district court of the third judicial district in and for the county of Salt Lake, State of Utah, to the United States circuit court of the district of Utah, was filed by said defendant in the clerk's office of said State court, which is in words and figures following, to wit:

Petition for Removal.

To the honorable district court of the third judicial district in and for the county of Salt Lake and State of Utah:

Your petitioner, The Columbia Savings and Loan Association, respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

That the controversy in said suit is between citizens of different States, and that your petitioner, the defendant, in the above-entitled suit, was at the time of the commencement of the suit, and still is a resident and a citizen of the city of Denver, and State of Colorado.

And your petitioner offers herewith a good and sufficient surety for its entering in the circuit court of the United States for the district of Utah, on the first day of next session a copy of the record of this suit and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And *to* prays this honorable court to, proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed to said circuit court of the United States in and for the district of Utah, and it will ever pray.

COLUMBIA SAVINGS & LOAN ASSOCIATION.
[SEAL.] T. J. ZOLLARS, *President.*

14 STATE OF COLORADO, } ss:
County of Salt Lake, }

T. J. Zollars deposes and says: I am president of the above-named petitioner. The foregoing petition is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to these matters — it to be true.

T. J. ZOLLARS.

Subscribed and sworn to before me this 30th day of August, A. D., 1899.

LUCY J. DILLINGHAM,
Notary Public, Arapahoe County, Colorado.

J. NORMAN,
STEPHENS & SMITH,
Petitioner's Attorneys.

Indorsed: # 2734. Petition for removal from the district court of the third judicial — in and for the county of Salt Lake, State of Utah, to the U. S. circuit court of the district of Utah. Title of cause. Petition. Filed in clerk's office, Sept. 2, 1899, David C. Dunbar, clerk, by F. W. Little, deputy.

And afterwards and on the same day said defendant also filed *their* bond on removal which is in words and figures following to wit:

Bond on Removal.

Know all men by these presents, that the Columbia Savings and Loan Association, a corporation, of Denver, Colorado, as principal, and the United States Fidelity & Guaranty Company, a corporation of Baltimore, Maryland, as surety, are holden and stand firmly bound unto Antoinette B. Kinney and Clesson S. Kinney in the penal sum of one thousand dollars, for the payment whereof well and truly to be made unto the said Antoinette B. Kinney and Clesson S. Kinney, their heirs, representatives and assigns, — bind their successors and assigns jointly and severally firmly by these presents.

Upon condition nevertheless, that whereas the said The
15 Columbia Savings and Loan Association has petitioned the district court of the third judicial district in and for Salt Lake county, Utah, for the removal of a certain cause therein pending, wherein the said Antoinette B. Kinney and Clesson S. Kinney are plaintiffs, and the said The Columbia Savings and Loan Association is defendant, to the circuit court of the United States in and for the district of Utah.

Now, if the said The Columbia Savings and Loan Association shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record of said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit is wrongfully or improperly removed thereto, then this obligation shall be void, other- it shall remain in full force and virtue.

In witness whereof, the said The Columbia Savings and Loan Association, by its attorneys Stephens & Smith, and the said United States Fidelity & Guaranty Company by its attorneys-in-fact George H. Ingham and Benner X. Smith have caused this obligation to be executed this first day of September, A. D. one thousand eight hundred and ninety-nine.

THE COLUMBIA SAVINGS AND LOAN ASSOCIATION,
By STEPHENS & SMITH, *Its Attorneys.*
THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By GEO. H. INGHAM AND
[SEAL.] BENNER X. SMITH, *Its Attorneys-in-fact.*

STATE OF UTAH, } ss:
County of Salt Lake, }

George H. Ingham and Benner X. Smith, being severally duly sworn on oath depose and say that they are the attorneys-in-fact of the United States Fidelity & Guaranty Company, the surety
16 named in the foregoing obligation, for the State of Utah: that said company has complied with the laws of the State of Utah relative to loan and guaranty company so as to be entitled to do business within the State of Utah, and that said company is worth the sum specified in said obligation as the penalty thereof over and above all its just debts and obligations, exclusive of property exempt from execution.

[SEAL.]

GEO. H. INGHAM.
BENNER X. SMITH.

Subscribed and sworn to before me this 1st day of September, A. D., 1899.

CYRUS G. GATRELL,
Notary Public.

Endorsed: 2734. Filed in clerk's office Sep. 2, 1899. David C. Dunbar, dist. clerk. by F. W. Little, deputy clerk.

* * * * * * *

17 And on said 28th day of November, 1899, plaintiffs filed their motion to remand this cause to the United States circuit court for the district of Utah, which is in words and figures following to wit:

18 In the United States Circuit Court for the Eighth Circuit, District of Utah.

ANTOINETTE B. KINNEY and CLESSON B. KINNEY, Plaintiffs,
vs.
THE COLUMBIA BUILDING & LOAN ASSOCIATION, a Corporation, Defendant. } No. 349.

Now come the plaintiffs and move the court to remand the above-entitled cause to the district court of the third judicial district of the State of Utah, in and for the county of Salt Lake, on the ground that this court here is without jurisdiction to hear and determine the said cause, because the amount or matter in dispute therein does not, and at the time said cause was removed from the State court, did not exceed the sum or value of $2,000.00, exclusive of interest and cost.

RICHARDS & VARIAN,
Attorneys for Plaintiff.

I hereby certify that I believe the said motion is well founded in point of law, and the same is not interposed for delay.

(Signed) CHARLES S. VARIAN, *Attorney.*

To Messrs. Stephens & Smith and J. Norman, attorneys for defendant:

Please take notice, that the plaintiffs herein will, on Monday, the 4th day of December, 1899, at the opening of court on said day, or so soon thereafter as counsel can be heard, move the court in accordance with the foregoing motion for an order remanding said cause to the State court.

RICHARDS & VARIAN,
Attorneys for Plaintiffs.

Dated November 28, 1899.

Endorsed: In the circuit court of the United States, district of Utah. Title of cause. Copy of the within served on us this 28 day of Nov. 1899, Stephens & Smith, attorneys for defendants. Filed this 28 day of November, 1899. Jerrold R. Letcher, clerk By John W. Christy deputy.

19 And afterwards and on November 28th, 1899, defendant filed *their* answer and cross-complaint, which are in words and figures as follows, to wit:—

Answer and Cross-complaint.

This defendant now, and at all times hereafter, saving to itself all and all manner of benefit of exception, or otherwise, that can, or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering, says:

First. Defendant association admits that at times hereinafter mentioned, defendant was, and now is, a corporation organized and existing under the laws of the State of Colorado, and alleges that formerly the name of defendant was "The Columbia Building & Loan Association," but that, on February 14th, 1899, its name was changed, in accordance with the provisions of the statutes of the State of Colorado, to "The Columbia Savings & Loan Association," and that defendant association is a citizen of said State of Colorado.

Second. Defendant association admits, that on November 22nd, 1890, the complainant, Antoinette B. Kinney, was the owner in fee of the premises described in paragraph II of the complaint herein.

Third. Defendant association admits that complainant, Antoinette B. Kinney, applied to defendant for a loan of twenty-five hundred dollars ($2500), as set out in paragraph III of the complaint herein, but that, instead of said application having been made on or about November first, 1890, it was made on October 2nd, 1890.

Fourth. Defendant association admits that complainants' application for said loan of twenty-five hundred dollars was afterwards approved, and that said sum was loaned to complainants by defendant association, and that said complainants were required to, and did, make and execute and deliver to defendant association their promissory note, as set out in paragraph IV of the complaint herein.

20 Fifth. Defendant association admits that on the 22nd day of November, 1890, it advanced twenty-five hundred dollars ($2500) to complainants herein, and that complainants made and executed and delivered to defendant association their certain deed of trust, in writing, to secure the promissory note herein set forth, and that said deed of trust was in words and figures, and was endorsed as set out in paragraph V of the complaint herein.

Sixth. Defendant association admits that said deed of trust was acknowledged and certified so as to entitle it to record, and was recorded in the office of the county clerk and recorder of Salt Lake county, Utah, on the 22nd day of November, 1890, in Book "2 U" of Mortgages, on pages 288 to 291, of said records.

Seventh. Defendant association admits that complainants have paid defendant seventy-one (71) payments of forty dollars and sixty-three cents ($40.63) each, beginning with January 1891, and ending with November, 1896, and that complainants paid to defendant's association seven (7) payments of seventeen dollars and fifty cents ($17.50) each, as set out in paragraph VII of the complaint herein; but denies that complainants made a payment of seven dollars and fifty cents ($7.50) on December 2nd, 1893. Defendant association also denies that said seventy-one (71) payments of forty dollars and sixty-three cents each, or that said seven (7) payments of seventeen dollars and fifty cents each, or any of them, or any part of any of said payments, were, or should have been credited upon the principal of said loan, and alleges that complainant, Antoinette B. Kinney, was, at the time of making said loan, and the execution of said note, and deed of trust, and now is, a stockholder in defendant association being the owner of twenty-five (25) shares of class "A," of the capital stock of defendant association, represented by certificate No. 1849, upon which the by-laws of said association require a monthly installment paid of seventy (70) cents per share; and that the said Antoinette B. Kinney, at the time of making said loan and the execution of said note and deed of trust, assigned said twenty-five shares of stock to defendant association as additional collateral security for said loan; and that said seventy-one (71) payments of forty dollars and sixty-three cents ($40.63) each, were, in accordance with the by-laws and rules of defendant association, applied as follows, to wit: Seventeen dollars and fifty cents ($17.50) of each of said seventy-one payments of forty dollars and sixty-three cents ($40.63) each, and all of said seven payments of seventeen dollars and fifty cents ($17.50) each, were credited upon, and applied to the payment of the monthly installment of seventy cents per share upon said twenty-five shares of stock; and that the balance of said seventy-one (71) pay-
21 ments of forty dollars and sixty-three cents ($40.63) each, or twenty-three dollars and thirteen cents ($23.13) of each of said seventy-one payments was each month applied to the payment of the interest upon said twenty-five-hundred-dollar loan, in accordance with the by-laws and rules of defendant association.

Eighth. Defendant denies that complainants have overpaid their indebtedness to defendant, or that they have made any payment whatever upon the principal of said indebtedness.

Ninth. Defendant denies that complainants are entitled to an accounting, or to the cancellation of said promissory note or deed of trust.

Tenth. Defendant admits that said payments were made first at the banking-house of McCornick & Company, and afterwards at the Utah national bank, which banks were designated at different times as defendant's agent-, to collect the same, and that none of the payments referred to were made in Denver, Colorado, by said complainants.

Eleventh. Defendant admits that before bringing this action, complainants demanded that defendant cancel said deed of trust, and cancel and deliver to complainants said promissory note, and that defendant refused to do so.

Twelfth. Defendant admits that complainants insured the building upon said premises for a period of three years, and assigned the policy to defendant; but alleges that, instead of being dated April 1st, 1898, said policy was dated February 18th, 1898, and instead of being for twenty-five hundred dollars ($2500), said policy was for three thousand dollars ($3,000).

Thirteenth. Defendant admits that it has threatened to advertise and sell said property under the power of sale in said deed of trust.

Fourteenth. Defendant denies that if it advertises and sells said property that any damage to complainant- will be committed, or that any threatened act of defendant will produce irreparable damage to complainants.

Fifteenth. Defendant denies that three hundred dollars ($300) is a reasonable attorney's fee in this case, or that complainants are in any event entitled to attorneys' fees in connection with this suit.

22 Sixteenth. Wherefore, the defendant prays, that complainants' bill may be dismissed, and that defendant have and recover its costs.

Cross-complaint.

For cross-complaint and for affirmative relief, your orator shows to the honorable judges of the circuit court of the United States, in and for the district of Utah:

First. That it is a corporation, organized and existing under the laws of the State of Colorado, and is a citizen of said State, and that complainants herein are citizens and residents of Salt Lake City, State of Utah

Second. Your orator would further show that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars ($2,000).

Third. Your orator further shows that formerly its name was "The Columbia Building & Loan Association," but that, on February 14th, 1899, in accordance with the statutes of Colorado, the name of said association was changed to "The Columbia Savings & Loan Association."

Fourth. Your orator further shows that it is engaged in the general business of a building and loan association in Colorado, Utah,

and elsewhere; that, as such building and loan association, it is composed of persons who become members thereof by subscribing for shares of stock therein of the face value of one hundred dollars each and receive a certificate for the number of shares so subscribed for and a pass book; that such members are either investing members or borrowing members, and in either capacity they are mutually interested in the earnings and prosperity of said association; and that all payments made to said association, whether as principal, installments, dues, interest, penalties, or otherwise, go into a common fund to make valuable and of constantly increasing value the shares of stock respectively held by said members. That investing members are those who make no loans of the association, but simply, by way of investment, pay monthly installments of seventy (70) cents per share, on class "A" stock therein, and receive credit therefor in said pass book. That borrowing members in
23 said association are those who make loans from said association of various sums of money and secure the same by executing deeds of trust upon approved real estate and assign their stock in said association as a further pledge for the repayment of the loan; that such borrowing members, according to the by-laws and rules of said association, are required to pay monthly installments of seventy cents per share on twenty-five (25) shares of class "A" stock with each twenty-five-hundred-dollar loan, and the further sum of twenty-three dollars and thirteen cents ($23.13) per month as interest on each twenty-five-hundred-dollar loan; and the said installments and interest, as the same come in from the borrower, are added to the common fund of said association, thereby swelling the share of the borrower in said fund by a proportionate part of the money so paid in; also swelling the share of said borrower by the profits coming to him from the reinvestment of the fund so accumulated; that no payments of installments or interest made to said association by the borrower are credited upon the promissory note which the borrower executes to said association as evidence of said loan, but that such payments are credited in a pass book expressly provided for that purpose, which is so ruled and the entries therein so made as to show what portion of said monthly payment is applied upon stock and what portion is applied upon interest; that the essential plan of building and loan associations is to afford a long time to repay and allow small payments to be repeated at frequent intervals; and such is the plan of your orator; and unless certain members are permitted to destroy the aforesaid mutuality of interest of all the members in said common fund, and to appropriate to themselves more than their proportionate share of the earnings of the association in said common fund, accumulated as aforesaid, it is essential that borrowing members, as well as non-borrowing members, shall continue their aforesaid payments to said association until their stock shall have fully matured and become worth one hundred dollars per share.

Fifth. Your orator further shows that stock in your orator, The Columbia Savings & Loan Association, is matured when the amount in the said common fund to the credit of any share of stock, from monthly payments and profits, is equal to one hundred dollars,

and thereafter no more monthly payments are required to be made.

24 Sixth. Your orator further shows that, on October 2nd, 1890, complainant, Antoinette B. Kinney, as a stockholder in your orator, The Columbia Savings & Loan Association, and owning stock therein, having assented to the by-laws and rules thereof, applied to your orator for a loan of twenty-five hundred dollars ($2500), according to the plan hereinabove set forth in paragraph four of this cross-complaint, and that said application was approved by your orator's board of directors, and that the complainants, Antoinette B. Kinney and Clesson S. Kinney, on November 22nd, 1890, executed and delivered to your orator their promissory note for said sum of twenty-five hundred dollars ($2500) in letters and figures as follows, to wit:

"No. 40. SALT LAKE CITY, UTAH, *Nov. 22nd*, 1890.

On or before six years after date, for value received, we, or either of us, promise to pay to the Columbia Building and Loan Association, at its office in Denver, Colo. twenty-five hundred dollars.

With interest and installments according to the by-laws of the association, payable on or before the 5th day of each and every month.

$2500.00. ANTOINETTE B. KINNEY.
CLESSON S. KINNEY.

This note is secured by a deed of trust on —— —— also by —— shares of stock of the —— Association owned by the maker of the note."

Seventh. Your orator further shows that the complainants to secure the payment of said note, did, on the 22nd day of November, 1890, execute and deliver to your orator their certain deed of trust, as set out in paragraph V of the complainants' bill of complaint herein, conveying to Clyde J. Eastman, as trustee, and in case of his death, resignation, removal, or absence from the county of
25 Salt Lake, or refusal, or failure, or inability to act, then to the then acting sheriff of Salt Lake county, as successor in trust, the following-described property situate in the county of Salt Lake and State of Utah, to wit: Commencing eight (8) rods east of the N. W. corner of lot five (5), block thirty (30), plat "B," Salt Lake City survey; thence south ten (10) rods, east two (2), north ten (10) rods, west two (2) rods to place of beginning. Containing twenty (20) sqr. rods; with strip of land six (6) feet wide and ten (10) rods long immediately adjoining said described land on east side, for private driveway, but reserving a strip of land six (6) feet wide and ten (10) rods long on east side of said described property for private driveway. Said driveway to be used only by parties immediately adjoining on E. & W. of said driveway; which said deed of trust was duly acknowledged, and recorded in the office of the clerk and recorder of Salt Lake county, Utah, on November 22nd, 1890, in

Book 2 " U," pages 288–'89–'90–'91, as by said deed of trust and the certificate of acknowledgement and of the recording aforesaid endorsed thereon and ready to be produced, as this court shall direct, will more fully appear.

Eighth. Your orator would further show that complainant Antoinette B. Kinney, is a member and a stockholder in your orator, The Columbia Savings & Loan Association, and that in addition to said deed of trust, said complainant delivered to your orator, with her proper endorsement thereon, twenty-five (25) shares of class " A " of the capital stock of your orator, of the par value of one hundred dollars each, when fully matured, as evidenced by certificate No. 1849, in pledge, for the faithful payment of said note and the interest thereon, according to its tenor.

Ninth. Your orator further shows that Clyde J. Eastman resigned as trustee under said deed of trust on June 12th, 1894, and that William McQueen, who was sheriff of Salt Lake county during the year of 1894, and John F. Howells, the present sheriff of said county, have both resigned, and decline and refuse to act as trustee or successor in trust under said deed of trust.

26 Tenth. Your orator further shows that it is now the legal holder and owner of said note and deed of trust, and is still in possession of said twenty-five (25) shares of stock, pledged to your orator as aforesaid.

Eleventh. Your orator further shows that, by the terms of said promissory note and deed of trust, complainants agreed to continue the payments of seventy cents per share on the fifth day of each and every month, upon said twenty-five (25) shares of stock, represented by certificate No 1849, assigned to your orator by said complainant, Antoinette B. Kinney, as additional collateral security, as aforesaid, until said twenty-five shares of stock should be fully matured, by reason of the earnings of your orator making said shares of stock worth their full par value, to wit: one hundred dollass per share, as set out in paragraph five of this cross-complaint; and that, under the terms of said note and deed of trust, said complainants also agree to pay interest upon said promissory note at the rate of twenty-three dollars and thirteen cents ($23.13) per month, on the fifth day of each and every month, until said twenty-five shares of stock should fully mature and become worth one hundred dollars per share.

Twelfth. Your orator further shows that said twenty-five shares of stock have not been withdrawn, nor have they matured and become of the par value of one hundred dollars per share; but, your orator alleges, that said twenty-five shares of stock, after receiving their *pro rata* share of profits, were, on November 22nd, 1899, of the value of two thousand forty-two dollars and eighty-six cents ($2,042.86).

Thirteenth. Your orator further shows, that there is now due your orator, on account of said promissory note, the principal sum mentioned therein, to wit $2,500.00

And the further sum, as interest on said note from November 19th, 1896, to November 19th, 1899, 36 months, at $23.13 per month 832.68

Making the aggregate indebtedness now due and owing from said complainants herein, and each of them, to your orator, on the 19th day of November, 1899..... $3,332.68

27 Fourteenth. And your orator further shows that said complainants have failed for more than thirty-six (36) months to pay your orator the sum of forty dollars and sixty-three cents ($40.63), the same being the monthly installments, as aforesaid, of seventy cents per share on said twenty-five (25) shares of class "A" stock, and twenty-three dollars and thirteen cents ($23.13), the monthly interest upon said note, according to the terms thereof; nor have said complainants, or either of them, paid any part thereof, though often requested so to do; but, on the contrary, complainants, and both of them, have wholly failed to pay the same and have made a breach under the terms of said note and the deed of trust securing the same.

And your orator therefore prays:

First. That it may have a decree entered in favor of your orator, and against complainants, Antoinette B. Kinney and Clesson S. Kinney, for the principal sum of twenty-five hundred dollars ($2,500), being the amount now due on said note; also for the sum of eight hundred thirty-two dollars and sixty-eight cents (832.68) interest upon said note to November 19th, 1899; making the total amount of three thousand three hundred thirty-two dollars and sixty-eight cents ($3,332.68); together with interest upon said last-mentioned sum from November 19th, 1899, to date of decree; together with costs of suit and attorneys' fees.

Second. That your orator may sell said twenty-five (25) shares of stock, represented by certificate No. 1849, pledged as aforesaid, for not less than the sum of two thousand forty-two dollars and eighty-six cents ($2,042.86), the same being the present withdrawal value thereof; and that your orator may be the purchaser of said stock and credit the amount the same is sold for upon the amount of said judgment.

Third. That your orator may have the usual decree for the sale of the premises in said deed of trust described; that the proceeds of said sale be applied in payment of the amount due your orator, and that said complainants, and all persons claiming under them, or either of them, subsequent to the execution of said deed of
28 trust, either as purchasers, incumbrancers, leaseholders, or otherwise, may be barred and foreclosed of all right, title, claim, or equity of redemption, of said premises, and every part thereof, and that your orators may have judgment and execution against the said complainants, or either of them, for any deficiency which may remain after applying all the proceeds of the sale of said stock and the said real estate, properly applicable thereto, to the satisfaction of said judgment.

Fourth. That your orator may be a purchaser at the sale of said real estate, which shall be sold under the order of this honorable court by the marshal thereof, and that it may be the duty of the said marshal to give your orator credit on the order of sale, for any bid thereat, that may be made by your orator, upon the amount of the aforesaid judgment and costs hereof, and which shall stand in lieu of cash; and that said marshall execute to the purchaser a good and sufficient deed, to be confirmed by this honorable court, and that the purchaser be let into possession of said premises upon the production of said marshal's deed, confirmed by this court, as aforesaid; and that your orator may have such further or other relief in the premises as the nature and circumstances of this case may require, and as to this honorable court shall seem fit.

(Signed) STEPHENS & SMITH AND
J. NORMAN,
Attorneys for Defendant and Cross-complainant.

29 UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

T. J. Zollars, being first duly sworn upon oath, says:

That he is the president of The Columbia Savings & Loan Association, the defendant and cross-complainant in the foregoing answer and cross-complaint named, and has read the same and knows the contents thereof, and that the said answer and cross-complaint are true of his own knowledge, except as to those matters which are therein stated to be on information and belief, and as to those matters he believes them to be true.

(Signed) T. J. ZOLLARS.

Subscribed and sworn to before me this 24th day of November, A. D., 1899. My commission expires January 20th, 1903.

[SEAL.] (Signed) BESSIE THOMPSON,
Notary Public.

I hereby certify that the foregoing answer and cross-complaint are, in my opinion, well founded in point of law.

November 24th, 1899.

(Signed) J. NORMAN,
Counsel for Defendant.

Filed November 28th, 1899.

JERROLD R. LETCHER, *Clerk,*
By JOHN W. CHRISTY, *Deputy.*

Endorsed; No. 349. In the United States circuit court, for the district of Utah. Title of cause. Answer and cross-complaint. Service of two copies of the within is admitted this 28th day of November, 1899. Richards & Varian, solicitors for plaintiffs. Stephens & Smith, and J. Norman, att'ys for defendant and cross-complainant. Auerbach block, Salt Lake City, Utah.

30 And on December 30th, 1899, plaintiffs filed the following notice of motion to amend motion to remand, which was in words and figures, as follows:

Notice of Motion for Leave to Amend Motion.

Take notice, upon the hearing of the motion to remand in this cause, the plaintiffs will move the court for leave to amend said motion by adding thereto as a specific ground for the remanding of said cause that the diverse citizenship of the parties at the time of the commencement of the suit, and at the time of the removal of said cause from the State court, does not appear upon the record.

Respectfully,

(Signed) RICHARDS & VARIAN,
Attorneys for Plaintiffs.

To Stephens & Smith, attorneys for defendant.

Dated December 30th, 1899.

Endorsed: Notice. Copy of the within served on us this 30th day of December, 1899. Stephens & Smith, attorneys for defendant. Filed this 30th day of December, 1899. Jerrold R. Letcher, clerk, by J. W. Christy, deputy clerk. Richards & Varian, attorneys for plaintiffs.

And on January 2nd, 1900, defendant filed notice of motion to amend *their* answer and cross-complaint, which was in words and figures following:

31 *Notice of Motion to Amend Answer, &c.*

To the above-named plaintiffs and Richards & Varian, their solicitors:

You are hereby notified that upon the hearing of the motion to remand said cause, or upon the first day fixed by the court for hearing motions, should such day be reached before the hearing of said motion to remand, the defendant, The Columbia Savings & Loan Association, will move the court to permit it to amend its answer and cross-complaint in said cause filed, by amending paragraphs one and two of its cross-complaint on pages five and six of said answer and cross-complaint, so that said paragraphs shall read as follows:

First. That your orator, at the time of the commencement of this suit, was and ever since then, and now is, a corporation organized and existing under and by virtue of the laws of the State of Colorado, and a citizen and resident of the city of Denver, and State of Colorado, and tha the said plaintiffs, Antoinette B. Kinney and Clesson S. Kinney, at the time of the commencement of this suit, were, and ever since have been, and still are citizens of the State of Utah, and residents thereof, residing at the city of Salt Lake in the said State of Utah.

Second. Your orator further avers this is a controversy between citizens of different States, and that more than $2,000.00 exclusive of interest and costs is involved therein.

(Signed) STEPHENS & SMITH,
Solicitors for Defendant.

Service of a copy of the above notice accepted this 2nd day of January, A. D., 1900.

(Signed) RICHARDS & VARIAN,
Solicitors for Plaintiff.

Endorsed: 349. Filed in U. S. circuit court, district of Utah, Jan. 3 1900 Jerrold R. Letcher, clerk.

32 And afterwards and on January 3rd, 1900, defendant filed notice of motion to amend their petition for removal, which was in words and figures following:

Notice — Motion to Amend Petition for Removal.

To the above-named plaintiffs and Richards & Varian, their solicitors:

You are hereby notified that upon the hearing of the motion to remand said cause, or upon the first day fixed by the court for hearing motions, if such day be reached before said hearing, the defendant will ask leave of court to amend its petition for removal by adding to the second paragraph on page one of said petition, after the word "Colorado," the following allegation:

"That the plaintiffs, Antoinette B. Kinney and Clesson S. Kinney, and each of them, were, at the time of the commencement of this suit, and still are, citizens and residents of the city of Salt Lake, and State of Utah."

(Signed) STEPHENS & SMITH,
Solicitors for Defendant.

Service of the above notice accepted this 2nd day of January, A. D. 1900.

(Signed) RICHARDS & VARIAN,
Plaintiffs' Solicitors.

Endorsed: 349. Filed in U. S. circuit court. District of Utah. Jan. 3 1900 Jerrold R. Letcher, clerk.

And afterwards and on January 4th, 1900, same being one of the juridical days of the December, 1899 term of court the following order was made, to wit:—

Order: Motion to Remand Taken under Advisement.

At this day come said plaintiffs, by Charles S. Varian, their solicitor, and the said defendant by Frank B. Stephens and J. Norman, its solicitors also comes. And the motion of said plaintiffs to re-

mand this cause to the State court from whence it was removed to this court, coming on now to be heard, is argued by counsel and submitted and by the court taken under advisement.

33 And afterwards and on January 6th, 1900, same being one of the juridical days of the December, 1899, term of *of* court the following order was made, to wit:—

Order Denying Motion to Remand, &c.

At this day comes said defendant by J. Norman, its solicitor. And the motion of said plaintiff to remand this suit to the district court of the third judicial district of the State of Utah, in and for Salt Lake county, from whence it was removed to this court, having heretofore come on to be heard and having been argued by counsel, and submitted and by the court taken under advisement, and the court being now well advised in the premises, doth grant leave to said defendant to file its amendment to the petition for removal herein, and its amendment to its cross-complaint in this suit, and doth deny said motion to remand this suit to said district court.

And afterwards on January 6th, 1900, defendants filed amendment to petition for removal, which was in words and figures following:—

34 *Amendment to Petition for Removal.*

Comes now the defendant, The Columbia Savings & Loan Association, a corporation of the State of Colorado, and leave of court having been first duly had, amends its petition for removal filed in said cause by adding to the second paragraphs, on page one of the petition for removal, filed by it in this cause, after the word Colorado, the following:

"That the plaintiffs, Antoinette B. Kinney and Clesson S. Kinney herein, and each of them, were, at the time of the commencement of this suit, and still are citizens and residents of the city of Salt Lake, and State of Utah.

(Signed) STEPHENS & SMITH,
Solicitors for Defendant.

STATE OF UTAH, }
County of Salt Lake, } *ss:*

J. Norman being first duly sworn on oath, deposes and says: That he is the vice-president of The Columbia Savings & Loan Association, the defendant above named; that he has read the foregoing amendment to the defendant's petition for removal, and knows the contents thereof, and knows that the matters stated in said amendment are true of his own knowledge, except as to those matters therein stated upon information and belief, and as to such matters that he believes them to be true.

(Signed) J. NORMAN.

Subscribed and sworn to before me this 2nd day of January, A. D., 1900.

(Signed) BENNER X. SMITH,
[SEAL.] *Notary Public.*

Service of copy admitted, January 6, 1900, A. D.
RICHARDS & VARIAN,
Attorneys for Plaintiff.

Endorsed: 349 Filed Jan'y 6—1900, Jerrold R. Letcher, clerk.

35 And afterwards and on the same day defendant filed amendment to its answer and cross-complaint which was in words and figures following:

Amendment to Defendant's Answer and Cross-complaint.

Comes now the defendant, The Columbia Savings & Loan Association, a corporation of the State of Colorado, after leave of court first duly had, and hereby amends paragraphs first and second of its answer and cross-complaint upon pages five and six thereof, so that said paragraphs first and second shall now read as follows:

First. That your orator, at the time of the commencement of this suit, was and ever since then, and now is, a corporation organized and existing under and by virtue of the laws of the State of Colorado, and a citizen and resident of the city of Denver, and State of Colorado, and that the plaintiffs, Antoinette B. Kinney, and Clesson S. Kinney, at the time of the commencement of this suit, were, and ever since have been, and still are citizens of the State of Utah, and residents thereof, residing at the city of Salt Lake in the said State of Utah.

Second. Your orator further avers that this is a controversy between citizens of different States, and that more than $2,000.00 exclusive of interest and costs is involved therein.

(Signed) STEPHENS & SMITH,
Solicitors for Defendant.

STATE OF UTAH, }
County of Salt Lake, } *ss.:*

J. Norman being first duly sworn on oath deposes and says: That he is the vice-president of the defendant corporation; that he has read the foregoing amendment to defendant's answer and cross-complaint, and knows the contents thereof, and knows of his own knowledge that the matters therein stated are true, except — to those matters therein stated upon information and belief, and as to such that he believes them to be true.

(Signed) J. NORMAN.

36 Subscribed and sworn to before me this 2nd day of January, A. D. 1900.

(Signed) BENNER X. SMITH,
[SEAL.] *Notary Public.*

Service of copy admitted, January 6, 1900.
A. D. RICHARDS & VARIAN.

Endorsed: 349. Filed Jan'y 6, 1900. Jerrold R. Letcher, clerk.

And afterwards, and on January 24th, 1900, the plaintiff filed its motion to renew motion to remand, which was in words and figures following:—

Motion to Renew Motion to Remand.

Now come the plaintiffs and move the court for leave to renew the motion heretofore made and to remand the above-entitled cause to the district court of the third judicial district of the State of Utah, in and for the county of Salt Lake, on the ground that this court here is without jurisdiction to hear and determine the said cause, because the diverse citizenship of the respective parties at the time of the commencement of the suit and at the time of the removal of said cause from the State court, did not appear upon the record thereof at the time of said removal and of lodging said record in this court. And because it was not made to appear that the plaintiffs resided in this State at the time said suit was brought, nor was the State of the citizenship of said plaintiffs shown.

(Signed) RICHARDS & VARIAN,
Attorneys for Plaintiffs.

To Stephens & Smith, attorneys for defendant.
Dated January 24th, 1900.

I hereby certify that I believe the said motion is well founded in point of law, and the same is not interposed for delay.

(Signed) C. S. VARIAN, *Attorney.*

To Messrs. Stephens & Smith and J. Norman, attorneys for defendant:

Please take notice, that the plaintiffs herein will, on Monday, the 5th day of February, 1900, at the opening of court on said day, or so soon thereafter as counsel can be heard, in accordance with the
37 foregoing motion apply for leave to renew the motion heretofore made, and for an order remanding the said cause to the State court.

(Signed) RICHARDS & VARIAN,
Attorneys for Plaintiffs.

Dated January 24, 1900.

Filed Jan'y 26, 1900.

JERROLD R. LETCHER, *Clerk.*

Endorsed: Title court and cause. Notice of intention to renew motion to remand. Copy of within served on us this 24th day of Jan'y 1900 Stephens & Smith, att'ys for def't. Richards & Varian, att'ys for pl't'ffs.

And afterwards on April 23rd, 1900, plaintiff filed its order denying renewed motion to remand, in words and figures following:

Order Denying Renewed Motion to Remand.

In this suit, the motion of said plaintiffs for leave to renew their motion to remand and their motion to remand the same to the State court from whence it was heretofore removed to this court, having heretofore come on to be heard, and having been argued by counsel and submitted and by the court taken under advisement, and the court being now well advised in the premises, doth deny said motions, in accordance with a written opinion of the court this day handed down and filed herein. And on motion of plaintiffs they are given twenty days from this day to amend their bill herein in accordance with the practice of this court.

And afterwards and on the same day, the opinion of the judge of this court was handed down and filed, being in words and figures following:

38 *Opinion on Motion to Remand.*

The defendant removed this case from a State court to the circuit court of the United States. The plaintiffs moved to remand it on the ground that the petition for removal failed to show the requisite diversity of citizenship, and the defendant made a counter-motion to amend the petition for removal. These motions were heard by Judge Riner, then holding the circuit court in this district. The motion to remand was denied and the amendment allowed. The amendment was then made and as amended the petition for removal is unobjectionable. The plaintiffs now ask leave to renew their motion to remand, and that the suit be remanded on the same ground as that urged before Judge Riner. They contend that the court was without jurisdiction to permit the amendment or to entertain the suit, and that this question can be raised at any time. If the motion to remand had been denied by the judge before whom it is sought to be reviewed there would be no doubt of the propriety of the second motion. Until final judgment the question of jurisdiction is ordinarily open to reconsideration, and even when not raised by counsel it is the duty of the court, *sua sponte* to remand a cause removed from a State court of which the United States court has not jurisdiction.

18 St. 470, c. 137, sec. 5.
Missouri Pac. R'y *vs.* Fitzgerald, 160 U. S. 556.

But the case here presented is exceptional in this, that I am asked to vacate the action of a judge with co-ordinate power because I take a different view of the law from that taken by him. If I yield to this and remand the cause, the order of remand is open to reconsideration at least before it is filed in the State court. Suppose a motion to reconsider should be made before a third judge

temporarily holding the court, as well might be, and he exercising an independent judgment should vacate the order. Where would such changes stop? The circuit court is frequently held by different judges. In some districts it may happen that more than two judges have made orders or determinations in the trial court in the same case, and that such orders are not final in the sense that the court is without the power to vacate them; but if with every
39 new judge each prior proceeding is to be tested anew confusion must result and litigation be greatly prolonged. In this case if error was committed in refusing to remand, it is fitting that the matter be reviewed by an appellate court rather than that a district judge should substitute his judgment for that of another district judge. On the other hand, if I should entertain this motion, and, in accordance with rulings made by me in similar cases, remand the suit, the defendant would be without remedy, although there would be simply a difference of opinion between two co-ordinate judges. So far as the particular question here considered has been decided the authorities support the conclusion here reached.

Turner *vs.* Indianapolis, &c., R. Co., F. C. # 14259;
Wolcott *vs.* Sprague, 55 F., 546.

The general rule is stated in the 18th Ency. of Pl. & Prac. 380, as follows: "The denial of a motion to remand is always subject to "reconsideration and the cause may be subsequently remanded. "But an adverse ruling upon a motion to remand will not ordinarily "be disturbed on a renewal of the motion before another judge."

It follows that the decision of Judge Riner must be considered the law of this case unless it be reversed on appeal, and the motion to remand is denied.

Dated, April 23, 1900.

(Signed) JOHN A. MARSHALL, *Judge.*

Filed April 23, 1900.

JERROLD R. LETCHER, *Clerk.*

And on June 4th, 1900, plaintiffs filed bill of complaint against defendants which was in words and figures following, to wit:

40 *Reformed Bill of Complaint.*

To the honorable the judges of the circuit court of the United States for the district of Utah:

Antoinette B. Kinney and Clesson S. Kinney, both now citizens of the State of Utah, bring this, their bill against the Columbia Savings and Loan Association, a corporation organized and existing under and in pursuance of the laws of the State of Colorado, and now a citizen of said State. And thereupon the orators complain and say:

First. That at all the times herein mentioned, the defendant was and now is, a corporation organized and existing under the laws of the State of Colorado, and your orators aver, that upon the dates of

the issuance of the stock, and the execution of the note and trust deed, hereinafter mentioned, the name of the said corporation defendant was The Columbia Building and Loan Association, which said name was afterwards changed prior to the beginning of this suit to that of The Columbia Savings and Loan Association; that the several contracts hereinafter mentioned, were made with and by the defendant herein under the name of The Columbia Building and Loan Association.

Second. That on or about the 12th day of June, 1890, your orator, Antoinette B. Kinney, subscribed for twenty-five (25) shares of the capital stock of the defendant, and thereupon, on said day, a certificate of said shares was regularly issued unto your orator, which said certificate was numbered 1849, and upon its face stated that your orator was entitled to twenty-five (25) shares, of the par value of one hundred ($100.00) dollars each, class "A" of the capital stock of the defendant "subject to all the rules, regulations and by-laws of said association now in force, or which may be hereafter enacted;" that by the by-laws then in force, it was provided by section 1 of article 1, that "The objects of this association are to afford its shareholders safe and profitable investment and a protection for their savings and their families." And by section 3, article 2, that
41 "Any person may become a shareholder of this association by filling out and signing the required application and paying the necessary admission fee as follows:

No. of shares.	Amount of stock.	Admission fee.	Total monthly installment.
1	100	3.00	.70
2	200	5.00	1.40
3	300	6.00	2.10
4	400	7.00	2.80
5	500	7.50	3.50
6	600	8.00	4.20
7	700	8.50	4.90
8	800	9.00	5.60
9	900	9.50	6.30
10	1000	10.00	7.00"

And by section 14, it was provided that: "All shareholders shall pay, or cause to be paid, a monthly installment of seventy cents on each share named in his certificate, said installment to be paid to the association on or before the 5th day of each month during the continuance of the certificate. Shareholders are required to pay all monthly installments without notice. Ten cents from each monthly installment may be placed in the expense fund." And by section 4 of article 2, that each shareholder for each share named in his or her certificate should be entitled to a loan of one hundred dollars rom the association, and that all shares must be in force three months before the shareholder should be entitled to a loan; and by section 5 of said article, that: "All loans made by this association must be secured by satisfactory note and first mortgage, trust or other deed on real estate not to exceed 50 per cent. of its cash

value, together with the fire-insurance policy if on improved property."

And your orators further say, that no other or further provision relative to the maturing or value of the shares of stock, or the withdrawal thereof, in the said defendant corporation was made or contained in the said by-laws, or until as hereinafter stated. But, by a printed prospectus and representation made and given to your said orators prior to and at the time of the subscription for the shares of stock by your orator Antoinette B. Kinney, it was distinctly represented and declared as follows:

"Whenever the amount in the loan fund to the credit of any share (from monthly payments and profits) is equal to $100, such share shall be fully paid in and be considered to have fully
42 matured and no more monthly payments shall be required."

"Shares are estimated to mature in six years from their date and the member may then withdraw such shares and receive $100 therefor."

"This maturity of the shares is a conservative estimate for if based on the experiences and calculations of the larger English associations of a similar character, the shares would mature in a somewhat shorter period."

And it was thereby further declared and represented that:

"Stock may be withdrawn at any time and the member will be entitled to receive for each share the money paid into the loan fund in monthly payments on such shares, together with 6 per cent. annual interest." * * *

"Members who have obtained loans cannot withdraw their shares until loans are paid."

And it was also thereby represented and declared that:

"Loans are not made for longer than six years, and the borrower must carry stock or shares of the association equal in value at maturity to the amount of his loan. * * * Loans may be repaid at any time on giving 30 days' notice. A borrower who repays his loan before maturity may continue his stock in force as an investment, or he may withdraw it at his option."

And your orators further say, that all of said representations and declarations were believed to be true by your orators, and by them relied upon, and because of such representations and of their belief in the truth thereof, your orator, Antoinette B. Kinney, was induced to subscribe for and accept the shares of stock as hereinbefore mentioned, and both of your orators were induced to apply for the loan and borrow the money, as hereinafter mentioned, and that the subscription and issuance of stock, as aforesaid, were made by both parties in accordance with the representations of said prospectus, which by agreement of the parties were made a part of the contract of subscription, although at the time all of them were not contained in the original by-laws then in force.

And your orators further say, that, upon receiving the
43 certificate of stock, as aforesaid, your orator, Antoinette B. Kinney, paid to the defendant corporation the sum of twenty-

five ($25.00) dollars, as an admission fee, and thereupon received from the defendant its regular pass or account book, used by it to record the payments made by its shareholders each month; that it was stated in printing and writing upon the face of said pass book that: "Dues payable to McCornick & Co., local board treasurer, or remit to home office."

And your orators further say, that by the by-laws then in force, it was provided that: All payments on account of stock or loan might be made to a treasurer or depository designated by any local board of shareholders, where such exist, at the place of residence of the shareholder, and that in fact, such local board existed at the time of the issuance of the stock aforesaid and the making of the loan hereinafter mentioned in the city of Salt Lake, and that said board had designated a treasurer, with power to receive payments, as aforesaid, and that all payments hereinafter mentioned made, either on account of stock or of the loan hereinafter mentioned, were made by your orators, to the local treasurer or depository.

And your orators say, that the contract made by your orator, Antoinette B. Kinney, hereinbefore mentioned, as well as the contract made by your orators with the defendant, as hereinafter stated, were made in contemplation and in pursuance of the laws of the then Territory, now State of Utah, and to be performed therein.

And your orators further say, that they were, during all times herein mentioned and now are, husband and wife, and that the subscription for the stock aforesaid of defendant, although in the name of your orator, Antoinette B. Kinney, was in fact for the benefit of both your orators, and was made for the purpose of securing the loan hereinafter mentioned, and that after the issuance of the certificate, as aforesaid, and for each of the six months ending with December, 1890, your orators paid into defendant seventeen and 50/100 ($17.50) dollars, being the monthly installments, at the rate of seventy cents per share, as provided by the by-laws.

And your orators further say, that some time in October or November, of said year, they applied to the defendant for a loan
44 of two thousand five hundred ($2,500.00) dollars, in accordance with the defendant's prescribed rules and forms, and thereupon defendant loaned said sum of money to your orators on the 22nd day of November, 1890, and your orators made and delivered to defendant their promissory note, in words and figures, as follows, to wit:

"No. —. SALT LAKE CITY, UTAH, *November 22nd*, 1890.

On or before six years after date, for value received, we, or either of us promise to pay to the Columbia Building and Loan Association at its office in Denver, Colo., twenty-five hundred ($2500.00) dollars, with interest and installments according to the by-laws of the association payable on or before the 5th day of each and every month.

$2,500.00. ANTOINETTE B. KINNEY.
CLESSON S. KINNEY."

That thereupon your orators executed and delivered, as security for the payment of said note, a deed of trust upon certain lands and premises situate in the county of Salt Lake, then Territory of Utah, then owned in fee by your orator, Antoinette B. Kinney, which said deed of trust was and is in words and figures as follows, to wit:

"This indenture, made this twenty-second day of November, in the year of our Lord one thousand eight hundred and ninety between Antoinette B. Kinney and Clesson S. Kinney her husband, of the county of Salt Lake and Territory of Utah, parties of the first part; and Clyde J. Eastman, of the county of Arapahoe and State of Colorado, party of the second part;

Witnesseth; that whereas, Antoinette B. Kinney and Clesson S. Kinney have executed their promissory note bearing even date herewith, for the principal sum of twenty-five hundred ($2500.00) dollars, payable to the Columbia Building and Loan Association, at its office in Denver, Colorado, on or before six years after date, with interest and installments thereon according to the by-laws and rules of said association payable on or before the fifth of each and every month or to be counted as principal.

45 And whereas, the said parties of the first part being desirous of securing not only the prompt payment of said promissory note and the interest that may accrue thereon, in whose hands soever the same may be, but also to effectually secure and indemnify the said The Columbia Building and Loan Association for or on account of any assignment, endorsement or guarantee of said note.

Now therefore, the parties of the first part, in consideration of the premises and for the purpose aforesaid, and in the further consideration of one dollar to them in hand paid by the party of the second part, the receipt whereof is hereby confessed, have and do grant, bargain, sell and convey unto the said party of the second part, in trust, forever, all the lands and premises situate in the county of Salt Lake and Territory of Utah known and described as follows, to wit:

Commencing eight (8) rods east of N. W. corner of lot five (5) block thirty (30) plat "B" Salt Lake City survey, thence south ten rods; east two (2) rods; north ten (10) rods, west two (2) rods to the place of beginning, containing twenty square rods, with strip of land six (6) feet wide and ten rods long immediately adjoining said described land on east side for private driveway, but reserving a strip of land six (6) feet wide and ten (10) rods long on east side of said described property for private driveway, said driveway to be used only by parties immediately adjoining on E. & W. of said driveway.

To have and to hold the same, together with all and singular the tenements, hereditaments, privileges and appurtenances thereunto belonging, to the party of the second part, or upon his failure to act, to his successor in trust forever; in trust, nevertheless, that in case of default in the payment of the said promissory note or any part thereof, or the interest or installments thereon, according to the tenor and effect of said note, or in case of the breach of any of the covenants or agreements herein mentioned, then

on the application of the legal holder of said promissory note, or either of them, to sell and dispose of the said premises and all the right, title, benefit and equity of redemption of the said parties of the first part, their heirs and assigns therein at public auction, at the front door of the court-house in the county
46 of Salt Lake in the Territory of Utah or on said premises, or any part thereof, as may be specified in the notice of such sale, for the highest and best price that the same will bring in cash, four weeks' notice having been previously given of the time and place of such sale, by advertisement in any newspaper at that time published in the county in which the above-described property is situated, and to make, execute and deliver to the purchaser or purchasers at such sale good and sufficient deed or deeds of conveyance, for the premises sold; and out of the proceeds or avails of such sale and the purchase-money paid thereon, after first paying all costs of advertising, sale and conveyance, including the reasonable fees and commissions of the said party of the second part, and all other expenses of this trust, including all moneys advanced for insurance, taxes or other liens or assessments, with interest thereon at one per cent. per month, then to pay the principal of said note whether due and payable by the terms thereof or not, and interest due on said note up to the time of such sale, rendering the overplus (*if* any) unto the said parties of the first part their legal representatives or assigns, on reasonable request: (and it shall not be obligatory upon the purchaser or purchasers at any such sale to see to the application of the purchase-money) which sale or sales so made shall be a perpetual bar, both in law and equity, against the parties of the first part, their heirs and assigns, and all other persons claiming the premises aforesaid, or any part thereof, by, from through or under said parties of the first part or any of them.

And in case of any suit or proceedings at law or in equity *wherein* the said party of the second part by reason of his trusteeship under this deed, he shall be allowed and paid his reasonable costs, charges, attorneys' and solicitors' fees, in such suit or proceedings by the parties of the first part, and the same shall be a further charge and lien upon said premises under this deed, to be paid out of the proceeds of the sale thereof, as aforesaid, with interest thereon at the rate of one per cent. per month, if not otherwise paid by said parties of the first part. And the said party of the second part, or his successor in trust, with or without readvertising, is hereby
47 authorized and empowered to postpone or adjourn said sale from time to time, or any length of time, at his discretion; and also to sell the said premises *en masse* or in separate parcels, as he may prefer to think best. And the parties of the first part for themselves and their heirs, executors and administrators covenant and agree to and with the said party of the second part, and his successor in trust hereinafter named, that at the time of sealing and delivery of these presents they are well seized of said premises in fee-simple, and have good right, full power and lawful authority to grant, bargain and sell the same in the manner and form as aforesaid; that the same are free and clear of all liens and encumbrances whatsoever.

And, the said parties of the first part will in due season pay all taxes and assessments on said premises, and at the request of the second party will keep all buildings that may be at any time on said premises, during the continuance of said indebtedness, insured in such company or companies as the holder or holders of said note may from time to time direct; for such sum or sums as such companies will insure for, not to exceed the amount of said indebtedness, except at the option of the said parties of the first part, and will assign with proper consent of the insurers, the policy or policies of insurance to the said party of the second part, as further security for the indebtedness aforesaid. And in case of the refusal or neglect of the said parties of the first part, or either of them, thus to insure or assign the policies of insurance, or to pay such taxes or assessments, said party of the second part or his successor in trust or the holder of said note or either of them, may procure such insurance, or pay such taxes or assessments, and all moneys thus paid, with interest thereon, at one per cent. per month, shall become so much additional indebtedness, secured by this deed of trust and to be paid out of the proceeds of sale of the lands and premises aforesaid, if not otherwise paid by the said parties of the first part, and the said premises in the quiet and peaceable possession of the party of the second part or his successor in trust against all and every other person lawfully claiming or to claim the whole or any part thereof, the parties of the first part shall and will warrant and forever defend.

48 And it is stipulated and agreed, that in case of default in any of said payments of principal or interest, according to the tenor and effect of said promissory note aforesaid, or either of them or any part thereof or of a breach of any of the covenants or agreements therein by the parties of the first part their executors, administrators or assigns, then, and in that case, the whole of said principal sum hereby secured, and the interest thereon to the time of sale, may at once, at the option of the legal holder thereof become due and payable, and the said premises be sold in the manner and with the same effect as if the said indebtedness had matured.

And it is further agreed, and especially understood that in the case of the death, resignation, removal or absence from the county of Salt Lake or refusal or inability of said party of the second part to act, then the then acting sheriff of Salt Lake county shall be and hereby is appointed and made successor in trust, of the said party of the second part, and in such event the said land and premises shall become vested in such new trustee and all the power and authority by this indenture granted to the said party of the second part shall accrue to and be exercised by the said acting sheriff the same and to all intents and purposes as if he had been made the party of the second part herein.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

ANTOINETTE B. KINNEY. [SEAL.]
CLESSON S. KINNEY. [SEAL.]

Witness:
R. D. WINTERS."

That the said deed of trust was acknowledged and certified so as to entitle *ti* to be recorded and was recorded (and now remains of record and uncancelled), in the office of the county recorder of said Salt Lake county in the State of Utah, on the 22nd day of November, 1890, in Book "2 U" of Mortgages on pages 288–291; that also your orator, Antoinette B. Kinney, assigned to the defendant, in writing, the certificate of stock numbered 1849 aforesaid, and delivered the same to the defendant as collateral security for the
49 payment of the loan aforesaid.

And your orators also assigned to the defendant a policy of insurance in the sum of three thousand ($3,000.00) dollars, covering the premises aforesaid.

And your orators further say, that subsequently to the issuing by the defendant to your orator, Antoinette B. Kinney, of the certificate of stock aforesaid, the by-laws of the defendant were duly amended, so as to in part, at least, conform to the representations made and declared in and by the prospectus given by the defendant to your orators, as hereinbefore stated, which said amended by-laws were in force on or about the first day of January, A. D., 1891, but that your orators are not informed as to when said amended by-laws were first adopted and in force; that your orators have applied to the defendant corporation for a copy of said amended by-laws, and for copies of the proceedings by its shareholders and directors in relation thereto, but that the defendant has hitherto declined and refused to give your orators such copies.

And your orators further say, that by said amended by-laws, it is further provided in section 1 of article 1, that:

"The objects of this association are to afford its shareholders safe and profitable investments, and a protection for their savings; also to provide funds for such members as may desire to build homes, release mortgages from homes already built, or to borrow money, for any legitimate purposes, upon real-estate security."

And also by section 3, article 2, that:

"Each shareholder, for each share of stock named in his or her certificate, shall be entitled to and receive the sum of $100 when the monthly payments and profits apportioned thereto equal $100. The maturity of stock is estimated at seventy-two months, and all loans and calculations are made upon this estimate."

And also by section 4 of said article, that:

"Each shareholder, for each share named in his or her certificate shall be entitled to a loan of $100 from the association. * * *
50 All shares must be in force three months before said shareholder shall be entitled to a loan."

And also by section 7, of said article, that:

"Shareholders having obtained loans shall, on or before the last Saturday of each and every month, until the stock borrowed upon shall have matured and the loan is thereby repaid, make, or cause to be made, payments as follows: One-seventy-second of the sum borrowed (less the membership fee), also interest at the rate of 3 per cent. per annum upon the original amount of the loan."

And by section 9, of said article, that:

"All shareholders shall pay, or cause to be paid, a monthly installment of seventy cents on each share named in his certificate, said installments to be paid to the association on or before the last Saturday of each month during the continuance of the certificate, unless a loan has been obtained on the stock, when payments shall be made according to section 7. Shareholders are required to pay all monthly installments without notice."

And also by section 11, of said article, that:

"All monthly installments must be sent to the home office or paid to your local board treasurer or authorized collecting agent, on or before the last Saturday of each month, and if not paid at that time a fine of ten cents on each share will be charged for each month the payment may be in arrears."

And by section 14, of said article, that:

"Each certificate of shares shall be charged with any and all amounts that may be owing from the shareholder, or assigns, to the association, whether in installments, fines, loans, interest or dues, and at the time of paying said certificate the association reserves a lien thereon to secure such payment of any such indebtedness and the right to deduct and withhold said amount of any such account or indebtedness in payment thereof."

And also by section 15, of said article, that:

"Stock may be withdrawn at any time, and the member will be entitled to receive for each share the money paid into the loan fund in monthly payments on such shares, together with 6 per cent. annual interest. The association shall not be required, without the consent of the directors, to use more than one-half the money
51 received as monthly payments in any month, from any one branch, in the payment of withdrawing members from such branch. Members who have obtained loans cannot withdraw their shares until loans are paid."

Third. And your orators further say, that after the making of said loan and the execution and delivery of the said note, trust deed, stock certificate and insurance policy, your orators made monthly payments to the defendant through its designated agent in Salt Lake City, Utah, beginning with January A. D., 1891, of forty and 63/100 ($40.63) dollars, for sixty-seven (67) months, and until and including July A. D., 1896; that thereafter, for a period of twenty-four (24) months your orators made no further payments, but, that no default was declared, and afterwards your orators, with the consent of defendant, resumed payments, and thereupon paid to the defendant in the year A. D., 1896, during each of the months of August, September, October and November, the sum of forty and 63/100 ($40.63) dollars, and paid in the month of December the sum of seventeen and 50/100 ($17.50) dollars.

And your orators say, that all of said sums of money so paid as aforesaid, were received by the defendant, and entered in the said pass book of your orators by the agents of defendant, sometimes in the full sum of each payment under the head of "Totals," and sometimes apportioned by the defendant, to wit, seventeen and 50/100 ($17.50) dollars under the head of "Monthly interest," and twenty-

three and 13/100 ($23.13) dollars under the head of "Interest and dues."

And your orators say, that if the said entries of the moneys so paid and received, made in the manner and form aforesaid, were intended by the defendant as an application thereof on account of interest or of interest and dues, that the same were and are purely fanciful and arbitrary and not authorized by the contract and the law, because, as your orators say, that, in accordance with the contract aforesaid, and the true construction thereof, the payments so made by your orators, as aforesaid, should and must be applied as follows, to wit: Seventeen and 50/100 ($17.50) dollars or seventy cents per share each month on account of twenty-five (25)
52 shares of stock; six and twenty-five — ($6.25) dollars each month on account of interest on the loan at the rate of three per cent. per annum; and sixteen and 88/100 ($16.88) dollars each month, as paid on the principal debt.

And your orators say, that in accordance with such application of payments, they have paid upon the principal debt aforesaid, the sum of one thousand one hundred and ninety-eight and 48/100 ($1,198.48) dollars, together with interest on said debt in full; that with the payment of the loan your orators are entitled to withdraw and cancel the said shares of stock; that the net value of the said twenty-five (25) shares of stock, evidenced by certificate number 1849, as your orators are informed by the defendant, through its account stated to them, is about two thousand and seventy-six and 10/100 ($2,076.10) dollars.

And your orators say, that in accordance with the true construction of the contract made with the defendant, they are either entitled to have the said net value of the said stock credited upon their said original indebtedness, or if this be not true, that they are entitled to have the moneys paid upon said stock, with interest at six per cent. per annum, so credited.

And your orators say, that if they are entitled to have said net value credited upon said loan, in payment thereof, the said net value of two thousand and seventy-six and 10/100 ($2,076.10) dollars, together with the sums already paid on the debt amounting to one thousand one hundred and ninety-eight and 48/100 ($1,198.48) dollars, makes a credit of three thousand two hundred and seventy-four and 58/100 ($3,274.58) dollars, on account of your orators' note and trust deed, and thus your orators have overpaid their said debt to defendant in the sum of seven hundred and seventy-four and 58/100 ($774.58) dollars.

And your orators further say, that if, on the other hand, the net value of the said stock is not to be given as a credit aforesaid, they are, nevertheless, under their said contract, entitled to a credit for the sums paid in on said stock, at the rate of seventy (70c.) cents per share, and amounting in the aggregate to the sum of one thousand three hundred and sixty-five and 00/100 ($1,365.00) dollars, together with annual interest computed at the rate of six per cent., upon such payments, which sum of one thousand three hun-
53 dred and sixty-five ($1,365) dollars, together with the sum of one thousand one hundred and ninety-eight and 48/100

($1,198.48) dollars, paid as aforesaid upon the principal debt, amounts to two thousand five hundred and sixty-three and 48/100 ($2,563.48) dollars, thus showing an overpayment to the defendant of sixty-three and 48/100 ($63.48) dollars, and in a larger sum with the six per cent interest added, as aforesaid.

Fourth. And your orators further say, that notwithstanding the premises, the defendant now claims and asserts that of the sums of money paid monthly by your orators, as hereinbefore stated, the sum of seventeen and 50/100 ($17.50) dollars was and is applied on account of the stock, at the rate of seventy (70c.) cents per share, and that the sum of twenty-three and 13/100 ($23.13) dollars, was and is applied each month solely as interest on the principal debt of your orators to defendants and although the said stock has nearly matured, and is now of the net value of about two thousand and seventy-six and 10/100 ($2,076.10) dollars, that your orators are not entitled to withdraw the same, nor to have any credit for the net value thereof, nor for the sums paid on account thereof, nor for any portion of the monthly sums of twenty-three and 13/100 ($23.13) dollars, paid to defendant, except as interest on the principal debt, and that the said defendant now unjustly and unconscionably asserts and claims that the entire principal sum of two thousand five hundred ($2,500.00) dollars is yet due and unpaid, together with the further sum of eight hundred and fifty-two and 62/100 ($852.62) dollars, computed as interest; whereas, your orators charge the contrary to be the fact and truth, as hereinbefore stated.

Fifth. And your orators further say that before the bringing of this suit they demanded of the defendant that it satisfy the said indebtedness and deed of trust, and cancel and deliver to your orators their promissory note, and that it reassign to your orators the said policy of insurance, and permit your orators to withdraw their said shares of stock, all of which the defendant refused and still refuses to do, claiming and asserting that at least two thousand ($2,000.00) dollars was still due from your orators to defendant.

And your orators now further say, that at all times they have been and now are ready and willing to pay and satisfy all
54 just claims and demands of the defendant on account of and accruing from the contract and indebtedness hereinbefore stated and set out; that notwithstanding, the defendant threatens to, and unless restrained by the injunction of the honorable court, your orators say will cause the premises herein described to be sold under the power in the said trust deed, to satisfy its alleged claim, as aforesaid.

Sixth. And your orators further say, that Clyde J. Eastman resigned as trustee under said deed of trust, on or about June 13, 1894, and that as your orators are informed and believe, John F. Howells, the present sheriff of the county of Salt Lake declines and refuses to act as trustee, or as successor in trust, under said deed of trust.

Seventh. And your orators further say, that pursuant to the statute made and provided in such case, your orators are entitled to a reasonable counsel fee herein, which was and is of the sum of four hundred ($400.00) dollars.

Eighth. To the end therefor-, that your orators may have that relief which they can only obtain in a court of equity, and that the said defendant may answer the premises, but not upon oath or affirmation, the benefit whereof is hereby expressly waived by your orators, they now pray the court:

That an account may be taken by and under the direction and decree of this honorable court of the moneys paid by your orators to the defendant, with the interest, and that an account may be taken of the indebtedness, if any, due from your orators to the defendant, and that upon such an accounting, the defendant, if overpaid the sum due from your orators to defendant, be decreed to pay unto your orators the sums so overpaid, with interest, attorneys' fee of four hundred ($400.00) dollars, and their costs and proper charges; that the defendant be decreed to satisfy and cancel of record the trust deed of date November 22, 1890, and now of record in the office of the county recorder of Salt Lake county, State of Utah, on pages 281 to 291, in Book "2-U" of Mortgages, and to reassign to your orators the policy of insurance given to defendant as collateral security for the said loan made by it to your orators, and to satisfy and withdraw the said twenty-five (25) shares of the capital stock of defendant, represented by certificate number
55 1849.

And your orators further pray, that if upon an account being taken it shall appear that your orators have erred in the computation of said account and are mistaken in relation thereto, and the taking of said account shall result in it being made to appear that the full sum due and owing from your orators to the defendant has not been heretofore paid and discharged, but on the contrary that a sum of money still remains due from your orators to the defendant, that nevertheless your orators may be permitted to pay and discharge the same, and thereupon the specific relief herein next before prayed for may be decreed to your orators; that pending this suit the defendant, its officers and agents be restrained from selling the premises described in the said trust deed, and upon the hearing the injunction be made perpetual; and further that your orators have such other relief in the premises as to the nature of the case and circumstances may require, and as to equity and good conscience belongs.

May it please your honors, that the defendant, The Columbia Savings and Loan Association, it having already appeared and submitted to the jurisdiction of the court, and a writ of subpœna being unnecessary, be required to further appear before this honorable court and then and there full, true, direct and perfect answer make to all and singular the premises, and to stand, perform and abide by such order, direction and decree as may be made against it in the premises, as shall seem meet and agreeable to equity. And your orators will ever pray.

(Signed) F. S. RICHARDS,
C. S. VARIAN,
Counsel for Plaintiff-.

UNITED STATES OF AMERICA, } ss:
District of Utah, }

Clesson S. Kinney, being first duly sworn, upon his oath says, that he is one of the plaintiffs above named; that he has read the foregoing bill of complaint, subscribed by his counsel, and
56 that he knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

(Signed) CLESSON S. KINNEY.

Subscribed and sworn to before me this fourth day of June, 1900.

[SEAL.] T. L. MITCHELL,
Notary Public.

Endorsed: Title of court & cause. Complaint. Receipt of a copy of the within bill of complaint this 4th day of June, 1899. Stephens & Smith, counsel for defendant. Filed June 4, 1900. Jerrold R. Letcher, clerk. Richards and Varian att'ys for pl't'ff.

And on August 7, 1900, the defendants filed their answer and cross-complaint, being in words and figures following, to wit:

Answer and Cross-complaint.

This defendant now, and at all times hereafter, saving to itself all and all manner of benefit of exception, or otherwise, that can, or may be had or taken to the many errors, uncertainties and imperfections in the bill of complaint herein, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering, says:

First. Admits that at all the times mentioned in said bill of complaint defendant was, and now is a corporation organized and existing under the laws of the State of Colorado; and admits that at the time of the making of the several contracts in said bill mentioned the name of the defendant was The Columbia Building and Loan Association, and that said name was, prior to the commencement of this suit, changed to The Columbia Savings and Loan Association.

Second. Defendant further answering, admits that the plaintiff, Antoinette B. Kinney, subscribed for, and that there *was* issued to her, on the 12th day of June, 1890, twenty-five shares of the
57 capital stock of defendant, and that the certificate of said stock was numbered 1849, and that shares were of the par value of one hundred dollars each, of class "A." Admits that the quotation from the certificate of stock, set out in the second paragraph of said bill, is a correct quotation, except that the word "conditions" should be inserted before the word "rules" and the word "re-enacted" should be changed to "enacted." Admits that the several quotations from the by-laws of defendant, and the several quotations from the prospectus of defendant, set out in the second

paragraph of said bill, are correct quotations from said by-laws and from said prospectus. Admits that the subscription to, and the issuance of stock, as aforesaid, was made and issued in accordance with the representations of said prospectus, and that the by-laws of defendant constituted a part of the contract of subscription. Admits the payment of the sum of twenty-five dollars, and the reception of a pass book by said Antoinette B. Kinney, as alleged in said second paragraph, and that the quotation from said pass book is correct. Denies that the by-laws, then in force, provided that all payments on account of stock or loan might be made to a treasurer or depository designated by any local board of shareholders, when such exist at the place of the residence of the shareholder, but admits that a local board existed at the city of Salt Lake, and that all payments made after the issuance of said stock as aforesaid, were made to the local treasurer or to a designated depository. Denies that any of the contracts between the plaintiffs, or either of them, mentioned in said bill, were made in pursuance of the laws of the then Territory of Utah, and denies that said contracts or either of them were to be performed in said Territory or in the State of Utah.

Alleges that defendant has no knowledge whether or not plaintiffs were husband and wife during any of the times mentioned in said bill, or whether or not they are now husband and wife, or whether the subscription for stock was for the benefit of both plaintiffs, but admits that subscription was made for the purpose of securing a loan from defendant. Admits the payment of the monthly installment of $17.50 for six months, as alleged in said second paragraph of said bill on the fifth page thereof. Admits that plaintiffs applied to defendant for a loan of two thousand five hundred
58 dollars, that defendant loaned said sum to plaintiffs, that plaintiffs made their promissory note to defendant therefor, and to secure the payment of said note executed and delivered to the defendant a deed of trust, which was recorded in the office of the county recorder of Salt Lake county in the State of Utah, and now remains of record and uncancelled, as said several facts are alleged and set out in the second paragraph of said bill of complaint. Admits the assignment of the certificate of stock and policy of insurance, as alleged in said bill of complaint.

Denies that plaintiffs, or either of them, ever at any time applied to the defendant for a copy of any by-laws or amended by-laws, or for copies of any of the proceedings by its shareholders and directors which defendant declined or refused to comply with.

Third. Defendant further answering, admits the making of the several payments to the defendant at the time and in the manner, and that such payments were entered in the pass book, as alleged in the third paragraph of said bill, but denies that the sum of sixteen and 88/100 dollars of said payments, or any other portion of said payments, should or must be applied, each month, as a payment on the principal debt.

Denies that plaintiffs have paid upon the principal debt aforesaid the sum of one thousand one hundred and ninety-eight and 48/100 dollars, and alleges that no part of said principal debt has been paid.

Denies that plaintiffs have overpaid their said debt to the defendant in the sum of seven hundred and seventy-four and 58/100 dollars, or in any other sum. Denies that the application of payments, made by plaintiffs or either of them, should be made as alleged in said bill of complaint.

Fourth. Defendant further answering, admits that sums of money paid monthly by plaintiffs, or either of them, were and are applied as alleged in the fourth paragraph of said bill; and alleges that said stock is now of the value of more than two thousand and seventy-six and 10/100 dollars, to wit, of the value of two thousand two hundred eight and 45/100 dollars on the 12th day of August, 1900.

Denies that defendant claims that plaintiffs are not entitled to withdraw the value of said stock, and alleges that such withdrawal may be made in accordance with the provisions of the by-
59 laws; admits that defendant claims that plaintiffs are not entitled to have credit on their said promissory note of the amount of the value of their said stock, nor for any portion of the monthly sums of twenty-three and 13/100 dollars, except as interest on the principal debt; admits that defendant claims that the entire principal sum of two thousand five hundred dollars, together with a large amount of interest thereon, is now due and unpaid.

Fifth. Defendant further answering, admits that before the commencement of this suit the plaintiffs demanded of the defendant that it satisfy the said indebtedness and deed of trust, and cancel and deliver to them their said promissory note, and reassign to them said policy of insurance, and permit them to withdraw said shares of stock, all of which defendant refused and still refuses to do; denies that plaintiffs have at all times been ready and willing, or are now ready and willing to pay and satisfy all just claims and demands of defendant on account of and accruing from the contract and indebtedness set out in said bill of complaint.

Sixth. Defendant further answering, admits all the allegations of the sixth paragraph of said bill of complaint.

Seventh. Defendant further answering, denies that plaintiffs are entitled to a counsel fee herein, and denies that the sum of four hundred dollars is a reasonable counsel fee.

Cross-complaint.

For cross-complaint and for affirmative relief, your orator shows to the honorable judges of the circuit court of the United States, in and for the district of Utah:

First. That it is a corporation, organized and existing under the laws of the State of Colorado, and is a citizen of said State, and that complainants herein are citizens and residents of Salt Lake City, State of Utah.

Second. Your orator would further show that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars ($2,000).

Third. Your orator further shows that formerly its name was

"The Columbia Building & Loan Association," but that, on
60 February 14th, 1899, in accordance with the statutes of Colorado, the name of said association was changed to "The Columbia Savings & Loan Association."

Fourth. Your orator further shows that it is engaged in the general business of a building and loan association in Colorado, Utah, and elsewhere; that, as such building and loan association, it is composed of persons who become members thereof by subscribing for shares of stock therein of the face value of one hundred dollars each and receive a certificate for the number of shares so subscribed for and a pass book; that such members are either investing members or borrowing members, and in either capacity they are mutually interested in the earnings and prosperity of said association; and that all payments made to said association, whether as principal, installments, dues, interest, penalties, or otherwise, go into a common fund to make valuable and of constantly increasing value the shares of stock respectively held by said members. That investing members are those who make no loans of the association, but simply, by way of investment, pay monthly installments of seventy (70) cents per share, on class "A" stock therein, and receive credit therefor in said pass book. That borrowing members in said association are those who make loans from said association of various sums of money and secure the same by executing deeds of trust upon approved real estate and assign their stock in said association as a further pledge for the repayment of the loan; that such borrowing members, according to the by-laws and rules of said association, are required to pay monthly installments of seventy cents per share on twenty-five (25) shares of class "A" stock with each twenty-five-hundred-dollars loan, and the further sum of twenty-three dollars and thirteen cents ($23.13) per month as interest on each twenty-five-hundred-dollar loan; and the said installments and interest, as the same come in from the borrower, are added to the common fund of said association, thereby swelling the share of the borrower in said fund by a proportionate part of the amount so paid in; also swelling the share of said borrower by the profits coming to him from the reinvestment of the fund so accumulated; that no payments of installments or interest made to said association by the borrower are credited upon the promissory note which the borrower
61 executes to said association as evidence of said loan; but that such payments are credited in a pass book expressly provided for that purpose, which is so ruled and the entries therein so made as to show what portion of said monthly payment is applied upon stock and what portion is applied upon interest; that the essential plan of building and loan associations is to afford a long time to repay and allow small payments to be repeated at frequent intervals; and such is the plan of your orator; and unless certain members are permitted to destroy the aforesaid mutuality of interest of all the members in said common fund, and to appropriate, to themselves, more than their proportionate share of the earnings of the association in said common fund, accumulated as aforesaid, it is essential that borrowing members, as well as non-

borrowing members, shall continue their aforesaid payments to said association until their stock shall have fully matured and become worth one hundred dollars per share.

Fifth. Your orator further shows that stock in your orator, The Columbia Savings & Loan Association, is matured when the amount in the said common fund to the credit of any share of stock, from monthly payments and profits, is equal to one hundred dollars, and thereafter no more monthly payments are required to be made.

Sixth. Your orator further shows that, on October 2nd, 1890, complainant, Antoinette B. Kinney, as a stockholder in your orator, The Columbia Savings & Loan Association, and owning stock therein, having assented to the by-laws and rules thereof, applied to your orator for a loan of twenty-five hundred dollars ($2500), according to the plan hereinabove set forth in paragraph four of this cross-complaint, and that said application was approved by your orator's board of directors, and that the complainants, Antoinette B. Kinney and Clesson S. Kinney, on November 22nd, 1890, executed and delivered to your orator their promissory note for said sum of twenty-five hundred dollars ($2500) in letters and figures as follows, to wit:

No. 40. SALT LAKE CITY, UTAH, *Nov. 22nd*, 1890.

On or before six years after date, for value received, we, or either of us, promise to pay to the Columbia Building and Loan Association, at its office in Denver, Colorado, twenty-five hundred dollars.

62 With interest and installments according to the by-laws of the association, payable on or before the 5th day of each and every month.

$2500.00. ANTOINETTE B. KINNEY.
CLESSON S. KINNEY.

This note is secured by a trust deed on —— —— also by — shares of stock of the —— Association, owned by the maker of the note.

Seventh. Your orator further shows that the complainants to secure the payment of said note, did, on the 22nd day of November, 1890, execute and deliver to your orator their certain deed of trust as set out in paragraph 2 of the complainants' bill of complaint herein, conveying to Clyde J. Eastman, as trustee, and in case of his death, resignation, removal, or absence from the county of Salt Lake, or refusal, or failure, or inability to act, then to the then acting sheriff of Salt Lake county, as successor in trust, the following-described property situate in the county of Salt Lake and State of Utah, to wit: Commencing eight (8) rods east of the N. W. corner of lot five (5) block thirty (30), plat "B," Salt Lake City survey; thence south ten (10) rods, east two (2) rods, north ten (10) rods, west two (2) rods to the place of beginning. Containing twenty (20) sqr. rods; with strip of land six (6) feet wide and ten (10) rods long immediately adjoin-

ing said described land on east side, for private driveway, but reserving a strip of land six (6) feet wide and ten (10) rods long on the east side of said described property for private driveway. Said driveway to be used only by parties immediately adjoining on E. & W. of said driveway; which said deed of trust was duly acknowledged, and recorded in the office of the clerk and recorder of Salt Lake county, Utah, on November 22nd, 1890, in Book 2 "U," pages 288–'89–'90–'91, as by said deed of trust and the certificate of acknowledgement and of the recording aforesaid, endorsed thereon and ready to be produced, as this court shall direct, will more fully appear, a copy of which said deed of trust with the endorsements thereon, is hereto attached as Exhibit "A."

63 Eighth. Your orator would further show that complainant Antoinette B. Kinney, is a member and a stockholder in your orator The Columbia Savings & Loan Association, and that in addition to said deed of trust, said complainant delivered to your orator, with her proper endorsement thereon, twenty-five (25) shares of class "A" of the capital stock of your orator, of the par value of one hundred dollars each, when fully matured, as evidenced by certificate No. 1849, in pledge, for the faithful payment of said note and the interest thereon, according to its tenor.

Ninth. Your orator further shows that Clyde J. Eastman resigned as trustee under said deed of trust on June 12th, 1894, and that William McQueen, who was sheriff of Salt Lake county during the year of 1894, and John F. Howells, the present sheriff of said county, have both resigned, and decline and refuse to act as trustee or successor in trust under said deed of trust.

Tenth. Your orator further shows that it is now the legal holder and owner of said note and deed of trust, and is still in possession of said twenty-five (25) shares of stock pledged to your orator as aforesaid.

Eleventh. Your orator further shows that, by the terms of said promissory note and deed of trust, complainants agreed to continue the payment of seventy cents per share on the fifth day of each and every month, upon said twenty-five (25) shares of stock represented by certificate No. 1849, assigned to your orator by said complainant Antoinette B. Kinney, as additional collateral security, as aforesaid, until said twenty-five shares of stock should be fully matured, by reason of the earnings of your orator making said shares of stock worth their full par value, to wit: one hundred dollars per share, as set out in paragraph five of this cross-complaint; and that, under the terms of said note and deed of trust, said complainants also agreed to pay interest upon said promissory note at the rate of twenty-three dollars and thirteen cents ($23.13) per month, on the fifth day of each and every month, until said twenty-five shares of stock should fully mature and become worth one hundred dollars per share.

Twelfth. Your orator further shows that said twenty-five shares of stock have not been withdrawn, nor have they ma-

64 tured and become of the par value of one hundred dollars per share; but, your orator alleges, that said twenty-five

shares of stock, after receiving their *pro rata* share of profits, were on August 12th, 1900, of the value of two thousand two hundred and eight and 45/100 dollars.

Thirteenth. Your orator further shows that there is now due your orator, on account of said promissory note, the principal sum mentioned therein, to wit..... $2,500.00

And the further sum, as interest on said note from November 19th, 1896, to July 19th, 1900, 44 months, at $23.13 per month..... 994.60

Making the aggregate indebtedness now due and owing from said complainants herein, and each of them, to your orator, on the 19th day of July, 1900..... ..... $3,494.60

Fourteenth. And your orator further shows that said complainants have failed for more than forty-four (44) months to pay to your orator the sum of forty dollars and sixty-three cents ($40.63) the same being the monthly installments, as aforesaid, of seventy cents per share on said twenty-five (25) shares of class "A" stock, and twenty-three dollars and thirteen cents ($23.13), the monthly interest upon said note, according to the terms thereof; nor have said complainants, or either of them, paid any part thereof, though often requested so to do; but, on the contrary, complainants, and each of them, have wholly failed to pay the same and have made a breach under the terms of said note and the deed of trust securing the same.

And your orator therefore prays:

First. That it may have a decree entered in favor of your orator, and against complainants, Antoinette B. Kinney and Clesson S. Kinney, for the principal sum of twenty-five hundred dollars ($2500) being the amount now due on said note; also for the sum of nine hundred ninety-four dollars and sixty dents ($994.60), interest upon said note to July, 1900; making the total amount of three thousand four hundred ninety-four dollars and sixty cents ($3,494.60); together with interest upon said last-mentioned sum from July 19th, 1900, to date of decree; together with costs of suit and attorneys' fees.

Second. That your orator may sell said twenty-five (25) shares of stock, represented by certificate No. 1849, pledged as afore-
65 said, for not less than the sum of two thousand two hundred and eight dollars and forty-five cents ($2,208.45), the same being the present withdrawal value thereof; and that your orator may be the purchaser of said stock and credit the amount the same is sold for upon the amount of said judgment.

Third. That your orator may have the usual decree for the sale of the premises in said deed of trust described; that the proceeds of said sale be applied in payment of the amount due your orator, and that said complainants, and all persons claiming under them, or either of them, subsequent to the execution of said deed of trust, either as purchasers, incumbrancers, leaseholders, or otherwise, may be barred and foreclosed of all right, title, claim, or equity of re-

demption in and to said premises, and every part thereof, and that your orator may have judgment and execution against the said complainants, or either of them, for any deficiency which may remain after applying all the proceeds of the sale of said stock and the said real estate, properly applicable thereto, to the satisfaction of said judgment.

Fourth. That your orator may be a purchaser at the sale of said real estate, which shall be sold under the order of this honorable court by the marshal thereof, and that it may be the duty of the said marshal to give your orator credit on the order of sale for any bid thereat that may be made by your orator upon the amount of the aforesaid judgment and costs hereof, and which shall stand in lieu of cash; and that said marshal execute to the purchaser a good and sufficient deed, to be confirmed by this honorable court, and that the purchaser be let into possession of said premises upon the production of said marshal's deed confirmed by this court as aforesaid; and that your orator may have such further or other relief in the premises as the nature and circumstances of this case may require, and as to this honorable court shall seem fit.

(Signed) STEPHENS & SMITH,
J. NORMAN,
Attorneys for Defendant and Cross-complainant.

66 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

T. J. Zollars, being first duly sworn upon oath, says:

That he is the president of The Columbia Savings and Loan Association, the defendant and cross-complainant in the foregoing answer and cross-complaint named, and has read the same and knows the contents thereof, and that the said answer and cross-complaint are true of his own knowledge, except as to those matters which are therein stated to be on information and belief, and as to those matters he believes them to be true.

(Signed) T. J. ZOLLARS.

Subscribed and sworn to before me this 4th day of August A. D. 1900.

My commission expires January 20, 1903.

[SEAL.] (Signed) BESSIE THOMPSON,
Notary Public.

I hereby certify that the foregoing answer and cross-complaint are, in my opinion, well founded in point of law.

August 4th, 1900.

(Signed) STEPHENS & SMITH,
Counsel for Defendant.

EXHIBIT "A."

40. $2,500. No. 30724.

Columbia Building & Loan Association, Denver, Colorado.

Deed of Trust, from Antoinette B. Kinney and Clesson S. Kinney, to Clyde J. Eastman, for the Use of Columbia Building and Loan Association.

11–22–'90.

67 STATE OF UTAH, } ss:
County of Salt Lake, }

I hereby certify that this deed was filed for record in my office at 2.55 o'clock p. m. November 22d, 1890, and is duly recorded in Book "2 U," pages 288–'9–'90–'1.

JOHN H. RUMSEL, JR., *Recorder.*

Fees: ——.

This indenture, made this twenty-second day of November, in the year of our Lord one thousand eight hundred and ninety between Antoinette B. Kinney and Clesson S. Kinney, her husband, of the county of Salt Lake and Territory of Utah, parties of the first part; and Clyde J. Eastman, of the county of Arapahoe, and State of Colorado, party of the second part, witnesseth, That whereas, Antoinette B. Kinney and Clesson S. Kinney have executed their promissory note, bearing even date herewith, for the principal sum of twenty-five hundred ($2500.00) dollars, payable to the Columbia Building and Loan Association, at its office in Denver, Colorado, on or before six years after date, with interest and installments thereon according to the by-laws and rules of said association payable on or before the fifth day of each and every month or to be counted as principal.

And whereas, the said parties of the first part being desirous of securing not only the prompt payment of said promissory note and the interest that may accrue thereon, in whose hands soever the same may be, but also to effectually secure and indemnify the said The Columbia Building and Loan Association for or on account of any assignment, endorsement or guarantee of said note.

Now, therefore, the said parties of the first part, in consideration of the premises, and for the purpose aforesaid, and in the further consideration of one dollar to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed, have and hereby do grant, bargain, sell and convey unto the said party of the second part, in trust, forever, all the lands and premises situate in the county of Salt Lake, and Territory of Utah, known and de-
68 scribed as follows, to wit:

Commencing eight (8) rods east of the N. W. corner of lot five (5), block thirty (30), plat "B," Salt Lake City survey, thence south ten (10) rods, east two (2) rods, north ten (10) rods, west two (2) rods to place of beginning, containing twenty (20) sqr. rods. With

strip of land six (6) feet wide and ten (10) rods long immediately adjoining said described land on east side, for private driveway, but reserving a strip of land six (6) feet wide and ten (10) rods long on east side of said described property for private driveway. Said driveway to be used only by parties immediately adjoining on E. & W. of said driveway.

To have and to hold the same, together with all and singular the tenements, hereditaments, privileges and appurtenances thereunto belonging, to the said party of the second part, or upon his failure to act, to his successor in trust forever; in trust, nevertheless, that in case of default in the payment of the said promissory note or any part thereof, or the interest or installments thereon, according to the tenor and effect of said note, or in case of the breach of any of the covenants or agreements herein mentioned, then on the application of the legal holder of said promissory note, or either of them, to sell and dispose of the said premises and all the right, title, benefit and equity of redemption of the said parties of the first part, their heirs and assigns therein at public auction, at the front door of the court-house in the county of Salt Lake, in the Territory of Utah, or on said premises, or any part thereof, as may be specified in the notice of such sale, for the highest and best price the same will bring in cash, four weeks' notice having been previously given of the time and place of such sale, by advertisement in any newspaper at that time published in the county in which the above-described property is situated, and to make, execute and deliver to the purchaser or purchasers at such sale good and sufficient deed or deeds of conveyance for the premises sold; and out of the proceeds or avails of such sale and the purchase-money paid thereon, after first paying all costs of advertising, sale and conveyance, including the reasonable fees and commissions of the said party of the second part, and all other expenses of this trust, including all moneys advanced
69 for insurance, taxes or other liens or assessments, with interest thereon at one per cent. per month, then to pay the principal of said note whether due and payable by the terms thereof or not, and interest due on said note up to the time of such sale, rendering the overplus (if any) unto the said parties of the first part, their legal representatives or assigns, on reasonable request; (and it shall not be obligatory upon the purchaser or purchasers at any such sale to see to the application of the purchase-money) which sale or sales so made shall be a perpetual bar, both in law and equity, against the said parties of the first part, their heirs and assigns, and all other persons claiming the premises aforesaid, or any part thereof, by, from, through or under said parties of the first part, or any of them.

And in case of any suit or proceeding at law or in equity wherein said party of the second part shall be made a party by reason of his trusteeship under this deed, he shall be allowed and paid his reasonable costs, charges, attorneys' and solicitors' fees, in such suit or proceeding by said parties of the first part, and the same shall be a further charge and lien upon said premises under this deed, to be paid out of the proceeds of sale thereof, as aforesaid, with interest

thereon at the rate of one per cent. per month, if not otherwise paid by said parties of the first part. And the said party of the second part, or his successor in trust, with or without re-advertising, is hereby authorized and empowered to postpone or adjourn said sale from time to time, or any length of time, at his discretion; and also to sell the said premises *en masse* or in separate parcels, as he may prefer *to* think best. And the said parties of the first part for themselves and their heirs, executors and administrators, convenant and agree to and with the said party of the second part, and his successor in trust hereinafter named, that at the time of the sealing and delivery of these presents they are well seized of said premises in fee-simple, and have good right, full power and lawful authority to grant, bargain and sell the same in manner and form as aforesaid; that the same are free and clear of all liens and encumbrances whatsoever.

And the said parties of the first part will in due season pay all taxes and assessments on said premises, and at the request of the party of the second party will keep all buildings that may at any time be on said premises, during the continuance of said indebtedness insured in such company or companies as the holder or holders of said note may from time to time direct; for such sum or sums as such companies will insure for, not to exceed the amount of said indebtedness, except at the option of said parties of the first part, and will assign with proper consent of the insurers, the policy or policies of insurance to the said party of the second part, as further security for the indebtedness aforesaid. And in case of the refusal or neglect of said parties of the first part, or either of them, thus to insure or assign the policies of insurance, or to pay such taxes or assessments, said party of the second part or his successor in trust or the holder of said note, or either of them, may procure such insurance, or pay such taxes or assessments, and all moneys thus paid, with interest thereon at one per cent. per month, shall become so much additional indebtedness, secured by this deed of trust and to be paid out of the proceeds of sale of the lands and premises aforesaid, if not otherwise paid by said parties of the first part, and the said premises in the quiet and peaceable possession of the party of the second part or his successor in trust against all and every other person lawfully claiming or to claim the whole or any part thereof, the said parties of the first part shall and will warrant and forever defend.

And it is stipulated and agreed, that in case of default in any of said payments of principal or interest, according to the tenor and effect of said promissory note aforesaid, or either of them or any part thereof, or of a breach of any of the covenants or agreements herein by the parties of the first part, their executors, administrators, or assigns, then, and in that case, the whole of said principal sum hereby secured, and the interest thereon to the time of sale, may at once, at the option of the legal holder thereof become due and payable, and the said premises be sold in the manner and with the same effect as if the said indebtedness had matured.

And it is further agreed, and especially understood that in case

of the death, resignation, removal or absence from the county of Salt Lake, or refusal or failure or inability of said party of the second part to act, then the then acting sheriff of Salt Lake
71 county shall be and hereby is appointed and made successor in trust of the said party of the second part, and in such event the said land and premises shall become vested in such new trustee and all the power and authority by this indenture granted to the said party of the second part shall accrue to and be exercised by the said acting sheriff the same to all intents and purposes as if he had been made the party of the second part herein.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

ANTOINETTE B. KINNEY. [SEAL.]
CLESSON S. KINNEY. [SEAL.]

Witness:
R. D. WINTERS.

TY. OF UTAH, } ss:
Salt Lake County, }

I, R. D. Winters, a notary public, in and for said county, in the State aforesaid, do hereby certify that Antoinette B. Kinney and Clesson S. Kinney, who are personally known to me to be the persons whose names are subscribed to the foregoing deed, appeared before me this day in person, and acknowledged that they each signed, sealed and delivered the said instrument of writing as their free and voluntary act, for the use and purposes therein set forth.

I further certify that my commission expires March 14" 1892. Given under my hand and notarial seal this twenty-second day of November A. D. 1890.

R. D. WINTERS,
[NOTARIAL SEAL.] *Notary Public.*

Endorsed: No. 349. Title of court and cause. Answer and cross-complaint. Copy of the within received August 6, 1900. Richards & Varian, complainants' solicitors. Filed August 7, 1900, Jerrold R. Letcher, clerk.

72 And afterwards and on to wit the 21st day of August, 1900, the defendant filed its cross-complaint in this court and cause, which being entitled in this court and cause, is in words and figures following, to wit:

Cross-complaint.

To the judges of the circuit court of the United States in and for the district of Utah:

Comes now your orator, leave of this court having been first duly had and entered, a citizen of the State of Colorado, and residing in Arapahoe county, in said State, and brings this, its cross-complaint against the above named plaintiffs, citizens of the State of Utah,

residing in Salt Lake county, in said State, and thereupon your orator complains and avers:

I.

That it is a corporation, organized and existing under the laws of the State of Colorado, and is a citizen of said State, and that complainants herein are citizens and residents of Salt Lake City, State of Utah.

II.

Your orator would further show that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand ($2,000) dollars.

III.

Your orator further shows that formerly its name was "The Columbia Building & Loan Association," but that on February 14th, 1899, in accordance with the statutes of Colorado, the name of said association was changed to "The Columbia Savings & Loan Association."

IV.

Your orator further shows that it is engaged in the general business of a building and loan association in Colorado, Utah,
73 and elsewhere; that, as such building and loan association, it is composed of persons who become members thereof by subscribing for shares of stock therein, of the face value of one hundred dollars each, and receive a certificate for the number of shares so subscribed for, and a pass book; that such members are either investing members or borrowing members, and in either capacity they are mutually interested in the earnings and prosperity of said association; and that all payments made to said association, whether as principal installments, dues, interest, penalties, or otherwise, go into a common fund to make valuable, and of constantly increasing value, the shares of stock respectively held by said members. That investing members are those who make no loans of the association, but simply, by way of investment, pay monthly installments of seventy (70) cents per share, on class "A" stock therein, and receive credit therefor in said pass book. That borrowing members in said association are those who make loans from said association of various sums of money, and secure the same by executing deeds of trust upon approved real estate, and assign their stock in said association as a further pledge for the repayment of the loan; that such borrowing members, according to the by-laws and rules of said association, are required to pay monthly installments of seventy cents per share on twenty-five (25) shares of class "A" stock, with each twenty-five-hundred-dollar loan, and the further sum of twenty-three dollars and thirteen cents ($23.13) per month, as interest on each twenty-five-hundred-dollar loan; and the said installments and interest, as the same come in from the borrower, are added to the common fund of said association, thereby swelling the share of the borrower in said fund by a proportionate part of the

amount so paid in; also swelling the share of said borrower by the profits coming to him from the reinvestment of the fund so accumulated; that no payments of installments or interest made to said association by the borrower are credited upon the promissory note which the borrower executes
74 to said association as evidence of said loan, but that such payments are credited in a pass book expressly provided for that purpose, which is so ruled, and the entries therein so made as to show what portion of said monthly payment is applied upon stock, and what portion is applied upon interest; that the essential plan of building and loan associations is to afford a long time to repay and allow small payments to be repeated at frequent intervals; and such is the plan of your orator; and unless certain members are permitted to destroy the aforesaid mutuality of interest of all the members in said common fund, and to appropriate to themselves more than their proportionate share of the earnings of the association in said common fund, accumulated as aforesaid, it is essential that borrowing members, as well as non-borrowing members, shall continue their aforesaid payments to said association until their stock shall have fully matured, and become worth one hundred dollars per share.

V.

Your orator further shows that stock in your orator, The Columbia Savings & Loan Association, is matured when the amount in the said common fund to the credit of any share of stock, from monthly payments and profits, is equal to one hundred dollars, and thereafter no more monthly payments are required to be made.

VI.

Your orator further shows that on October 2nd, 1890, complainant, Antoinette B. Kinney, as a stockholder in your orator, The Columbia Savings & Loan Association, and owning stock therein, having assented to the by-laws and rules thereof, applied to your orator for a loan of twenty-five hundred ($2500.00) dollars, according to the plan hereinabove set forth in paragraph four of this cross-complaint, and that said application was approved by your orator's board of directors, and that the complainants, Antoinette B. Kinney and Clesson S. Kinney, on November 22nd, 1890, executed and delivered to your orator their promissory note for
75 said sum of twenty-five hundred ($2500.00) dollars, in letters and figures as follows, to wit:

"No. 40. SALT LAKE CITY, UTAH, *Nov. 22nd*, 1890.

On or before six years after date, for value received, we, or either of us, promise to pay to the Columbia Building and Loan Association, at its office in Denver, Colo., twenty-five hundred dollars.

With interest and installments according to the by-laws of the association, payable on or before the 5th day of each and every month.

$2500.00. ANTOINETTE B. KINNEY.
CLESSON S. KINNEY.

This note is secured by a trust deed on —— also by — shares of stock of the —— Association, owned by the maker of the note."

VII.

Your orator further shows that the complainants, to secure the payment of said note, did, on the 22nd day of November, 1890, execute and deliver to your orator their certain deed of trust as set out in paragraph 2 of the complainants' bill of complaint herein, conveying to Clyde J. Eastman, as trustee, and in case of his death, resignation, removal or absence from the county of Salt Lake, or refusal, or failure, or inability to act, then to the then acting sheriff of Salt Lake county as successor in trust, the following-described property situate in the county of Salt Lake and State of Utah, to wit:

Commencing eight (8) rods east of the N. W. corner of lot five (5), block thirty (30), plat "B," Salt Lake City survey, thence south ten (10) rods, east two (2) rods, north ten (10) rods, west two (2) rods, to place of beginning. Containing twenty (20) sqr. rods; with strip of land six (6) feet wide, and ten (10) rods long immediately adjoining said described land on east side, for private driveway, but reserving a strip of land six (6) feet wide, and ten (10) rods long on east
76 side of said described property for private driveway. Said driveway to be used only by parties immediately adjoining on E. & W. of said driveway; which said deed of trust was duly acknowledged, and recorded in the office of the clerk and recorder of Salt Lake county, Utah, on November 22nd, 1890, in Book 2 "U," pages 288–'89–'90–'91, as by said deed of trust and the certificate of acknowledgment, and of the recording aforesaid, endorsed thereon and ready to be produced, as this court shall direct, will more fully appear, a copy of which said deed of trust, with the endorsements thereon, is fully set out in complainants' amended bill.

VIII.

Your orator would further show that complainant, Antoinette B. Kinney, is a member and a stockholder in your orator, The Columbia Savings & Loan Association, and that in addition to said deed of trust, said complainant delivered to your orator, with her proper endorsement thereon, twenty-five (25) shares of class "A" of the capital stock of your orator, of the par value of one hundred dollars each, when fully matured, as evidenced by certificate No. 1849, in pledge, for the faithful payment of said note, and interest thereon, according to its tenor.

IX.

Your orator further shows that Clyde J. Eastman resigned as trustee under said deed of trust on June 12th, 1894, and that William McQueen, who was sheriff of Salt Lake county during the year of 1894, and John F. Howells, the present sheriff of said county, have both resigned, and decline and refuse to act as trustee, or successor in trust under said deed of trust.

X.

Your orator further shows that it is now the legal holder and owner of said note and deed of trust, and is still in possession of said twenty-five (25) shares of stock pledged to your orator as aforesaid.

77

XI.

Your orator further shows that by the terms of said promissory note and deed of trust, complainants agreed to continue the payment of seventy cents per share on the fifth of each and every month, upon said twenty-five (25) shares of stock represented by certificate No. 1849, assigned to your orator by said complainant, Antoinette B. Kinney, as additional collateral security, as aforesaid, until said twenty-five shares of stock should be fully matured, by reason of the earnings of your orator making said shares of stock worth their full par value, to wit: one hundred dollars per share, as set out in paragraph five of this cross-complaint; and that under the terms of said note and deed of trust, said complainant also agreed to pay interest upon said promissory note at the rate of twenty-three dollars and thirteen cents ($23.13) per month, on the fifth day of each and every month, until said 25 shares of stock should fully mature, and become worth one hundred dollars per share.

XII.

Your orator further shows that said twenty-five shares of stock have not been withdrawn, nor have they matured, and become of the par value of one hundred dollars per share; but, your orator alleges, that said twenty-five shares of stock, after receiving their *pro rata* share of profits, were, on August 12th, 1900, of the value of two thousand, two hundred and eight and 45/100 dollars.

XIII.

Your orator further shows that there is now due your orator, on account of said promissory note, the principal sum mentioned therein, to wit..... $2,500.00

And the further sum, as interest on said note from November 19th, 1896, to July 19th, 1900, 44 months, at $23.13 per month..... 994.60

78 Making the aggregate indebtedness now due and owing from said complainants herein, and each of them, to your orator, on the 19th day of July, 1900..... $3,494.60

XIV.

And your orator further shows that said complainants have failed for more than forty-four (44) months to pay to your orator the sum of forty dollars, and sixty-three cents ($40.63) the same being the monthly installments as aforesaid, of seventy cents per share on said

twenty-five (25) shares of class "A" stock, and twenty-three dollars and thirteen cents ($23.13), the monthly interest upon said note, according to the terms thereof; nor have said complainants, or either of them, paid any part thereof, though often requested so to do; but, on the contrary, complainants and each of them, have wholly failed to pay the same, and have made a breach under the terms of said note, and the deed of trust securing the same.

To the end therefore, that your orator may have that relief, which it can only obtain in a court of equity, and that the complainants may answer the premises, but not upon oath, or affirmation, the benefit whereof is expressly waived by your orator.

It now prays the court:

I.

That it may have a decree entered in favor of your orator, and against complainants, Antoinette B. Kinney and Clesson S. Kinney for the principal sum of twenty-five hundred dollars ($2500.00), being the amount now due on said note; also for the sum of nine hundred ninety-four dollars and sixty cents ($994.60) interest upon said note to July 19th, 1900; making the total amount of three thousand four hundred ninety-four dollars, and sixty cents ($3,494.60); to-
79 gether with interest upon said last-mentioned sum from July 19th, 1900, to date of decree; together with costs of suit and attorneys' fees.

II.

That your orator may sell said twenty-five (25) shares of stock, represented by certificate No. 1849, pledged as aforesaid, for not less than the sum of two thousand two hundred and eight dollars and forty-five cents ($2,208.45), the same being the present withdrawal value thereof; and that your orator may be the purchaser of said stock, and credit the amount the same is sold for upon the amount of said judgment.

III.

That your orator may have the usual decree for the sale of the premises in said deed of trust described; that the proceeds of said sale be applied in payment of the amount due your orator, and that said complainants, and all persons claiming under them, or either of them, subsequent to the execution of said deed of trust, either as purchasers, incumbrancers, leaseholders, or otherwise, may be barred and foreclosed of all right, title, claim or equity of redemption in and to said premises, and every part thereof, and that your orator may have judgment and execution against the said complainants, or either of them for any deficiency which may remain after applying all the proceeds of the sale of said stock and the said real estate, properly applicable thereto, to the satisfaction of said judgment.

IV.

That your orator may be a purchaser at the sale of said real estate which shall be sold under the order of this honorable court by the marshal thereof, and that it may be the duty of the said

marshal to give your orator credit on the order of sale for any bid thereat that may be made by your orator upon the amount
80 of the aforesaid judgment, and costs hereof, and which shall stand in lieu of cash; and that said marshal execute to the purchaser a good and sufficient deed, to be confirmed by this honorable court, and that the purchaser be let into possession of said premises upon the production of said marshal's deed, confirmed by this court as aforesaid; and that your orator may have such further or other relief in the premises as the nature and circumstances of this case may require, and as to this honorable court shall seem fit

V.

That your honors grant to your orator a writ of subpœna, to be directed to the said Antoinette B. Kinney and Clesson S. Kinney, thereby commanding them at a certain time, and under a certain penalty therein to be limited, personally to appear before this honorable court, and then and there full, true, direct and perfect answer make to all and singular the premises, and to stand, perform and abide by such order, direction and decree as may be made against them in the premises, as shall seem meet and agreeable to equity.

And your orator will ever pray.

STEPHENS & SMITH,
J. NORMAN,
Attorneys for Defendant and Cross-complainant.

THE COLUMBIA SAVINGS &
LOAN ASSOCIATION,
By STEPHENS & SMITH,
Its Solicitors.

I hereby certify that the foregoing cross-complaint is, in my opinion, well founded in point of law.

August 21st, 1900.

BENNER X. SMITH,
Counsel for Defendant.

Filed August 21, 1900.
JERROLD R. LETCHER, *Clerk.*

81 And afterwards and on to wit, the 1st day of December, 1900, said defendant filed its amended answer to plaintiffs' bill of complaint, which is in words and figures as follows, to wit:

Amended Answer.

This defendant now, and at all times hereinafter, saving to itself all and all manner of benefit of exception, or otherwise, that can or may be had or taken to the many errors uncertainties and imperfections in the bill of complaint herein, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering says:

First. Admits that at all the times mentioned in said bill of complaint defendant was, and now is, a corporation organized and ex-

isting under the laws of the State of Colorado; and admits that at the time of the making of the several contracts in said bill mentioned the name of the defendant was The Columbia Building and Loan Association, and that said name was, prior to the commencement of this suit, changed to The Columbia Savings and Loan Association.

Second. Defendant further answering, admits that the plaintiff, Antoinette B. Kinney, subscribed for, and that there *was* issued to her, on the 12th day of June, 1890, twenty-five shares of the capital stock of defendant, and that the certificate of said stock was numbered 1849, and that said shares were of the par value of one hundred dollars each, of class "A." Admits that the quotation from the certificate of stock, set out in the second paragraph of said bill, is a correct quotation, except that the word "conditions" should be inserted before the word "rules," and the word "re-enacted" should be changed to "enacted." Admits that the several quotations from the by-laws of defendant, and the several quotations from the prospectus of defendant, set out in the second paragraph of said bill, are correct quotations from said by-laws and from said prospectus. Admits that the subscription and issuance of stock as aforesaid were made by both parties, in accordance with the representations of said prospectus, which by agreement of the parties were made a part of the contract of subscription. Admits that the subscription to and the issuance of stock, as aforesaid, was made and issued in accord-
82 ance with the representations of said prospectus, and that the by laws of defendant constituted a part of the contract of subscription. Admits that, subsequently to the issuing by the defendant to complainant, Antoinette B. Kinney, of the certificate of stock aforesaid, the by-laws of defendant were duly amended so as to conform to the representations made and declared in and by the prospectus given by defendant to complainants, as alleged in paragraph two, on page 8, of said amended complaint; which said amended by-laws were in force on or about January 1st, 1891. Admits the payment of the sum of twenty-five dollars, and the reception of a pass book by said Antoinette B. Kinney, as alleged in said second paragraph, and that the quotation from said pass book is correct. Denies that the by-laws, then in force provided that all payments on account of stock or loan might be made to a treasurer or depository designated by any local board of shareholders, when such exist at the place of residence of the shareholder, but admits that a local board existed at the city of Salt Lake, and that all payments made after the issuance of said stock, as aforesaid, were made to the local treasurer or to a designated depository. Denies that any of the contracts between the plaintiffs, or either of them, mentioned in said bill, were made in pursuance of the laws of the then Territory of Utah, and denies that said contracts, or either of them, were to be performed in said Territory or in the State of Utah.

Alleges that defendant has no knowledge whether or not plaintiffs were husband and wife during any of the times mentioned in said bill, or whether or not they are now husband and wife, or whether the subscription for stock was for the benefit of both plain-

tiffs, but admits that subscription was made for the purpose of securing a loan from defendant. Admits the payment of the monthly installment of $17.50 for six months, as alleged in said second paragraph of said bill on the fifth page thereof. Admits that plaintiffs applied to defendant for a loan of two thousand five hundred dollars, that defendant loaned said sum to plaintiffs, that plaintiffs made their promissory note to defendant thereof, and to secure the payment of said note executed and delivered to the defendant a deed of trust, which was recorded in the office of the county recorder of Salt Lake county in the State of Utah, and now remains of record and uncancelled, as said several facts are alleged and set out
83 in the second paragraph of said bill of complaint. Admits the assignment of the certificate of stock and policy of insurance, as alleged in said bill of complaint.

Denies that plaintiffs, or either of them, ever at any time applied to the defendant for a copy of any by-laws or amended by-laws, or for copies of any of the proceedings by its shareholders and directors which defendant declined or refused to comply with.

Third. Defendant further answering, admits the making of the several payments to the defendant at the time and in the manner, and that such payments were entered in the pass book, as alleged in the third paragraph of said bill, but denies that the sum of sixteen and 88/100 dollars of said payments, or any other portion of said payments, should or must be applied, each month, as a payment on the principal debt.

Denies that plaintiffs have paid upon the principal debt aforesaid the sum of one thousand one hundred and ninety-eight and 48/100 dollars, and alleges that no part of said principal debt has been paid. Denies that plaintiffs have overpaid their said debt to the defendant in the sum of seven hundred and seventy-four and 58/100 dollars, or in any other sum. Denies that the application of payments, made by plaintiffs or either of them, should be made as alleged in said bill of complaint.

Fourth. Defendant further answering, admits that sums of money paid monthly by plaintiffs, or either of them, were and are applied as alleged in the fourth paragraph of said bill; and alleges that said stock is now of the value of more than two thousand and seventy-six and 10/100 dollars, to wit, of the value of two thousand two hundred eight and 45/100 dollars on the 12th day of August, 1900.

Denies that defendant claims that plaintiffs are not entitled to withdraw the value of said stock, and alleges that such withdrawal may be made in accordance with the provisions of the by-laws; admits that defendant claims that plaintiffs are not entitled to have credit on their said promissory note of the amount of the value of their said stock, nor for any portion of the monthly sums of twenty-three and 13/100 dollars, except as interest on the principal
84 debt; admits that defendant claims that the entire principal sum of two thousand five hundred dollars, together with a large amount of interest thereon, is now due and unpaid.

Fifth. Defendant further answering, admits that before the com-

mencement of this suit the plaintiffs demanded of the defendant that it satisfy the said indebtedness and deed of trust, and cancel and deliver to them their promissory note, and reassign to them said policy of insurance, and permit them to withdraw said shares of stock, all of which defendant refused and still refuses to do; denies that plaintiffs have at all times been ready and willing, or are now ready and willing to pay and satisfy all just claims and demands of defendant on account of and accruing from the contract and indebtedness set out in said bill of complaint.

Sixth. Defendant further answering, admits all the allegations of the sixth paragraph of said bill of complaint.

Seventh. Defendant further answering, denies that plaintiffs are entitled to a counsel fee herein, and denies that the sum of four hundred dollars is a reasonable counsel fee.

Wherefore, this defendant, having fully answered, confessed, traversed, avoided, or denied all the matters in the said bill of complaint, material to be answered, according to its best knowledge and belief, humbly prays this honorable court to enter its decree that this defendant be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained, and for such further and other relief in the premises as to this honorable court may seem meet and in accordance with equity.

[Company's Seal.]

THE COLUMBIA SAVINGS AND LOAN ASSOCIATION, *Defendant*,
By ORRIN McNUTT, *Secretary*.

STEPHENS & SMITH,
J. NORMAN,
Solicitors for Defendant.

Endorsed: Amended answer. Rec'd copy Nov. 30, 1900. Richards and Varian pl't'ffs' solicitors. Filed Dec. 1, 1900, Jerrold R. Letcher, clerk.

85 And afterwards, and on the 17th day of December, 1900, the plaintiffs filed their replication, which is in words and figures as follows, to wit:—

Replication.

These replicants, Antoinette B. Kinney and Clesson S. Kinney, saving and reserving to themselves all and all manner of advantages of exception, which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of defendant, The Columbia Savings and Loan Association, a corporation, for replication thereunto, say:

That they do and will aver, maintain and prove their said bill to be true, certain and sufficient in law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by these replicants; without that, that any other matter or thing in

the said answer contained, material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these replicants are ready to aver, maintain and prove, as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

(Signed) FRANKLIN S. RICHARDS,
CHARLES S. VARIAN,
Solicitors for Complainants.

Copy of the foregoing served upon us this 17th day of Dec., A. D. 190–.

STEPHENS & SMITH,
Attorneys for Defendants.

Filed Dec. 17, 1900.
JERROLD R. LETCHER, *Clerk.*

86 And afterwards and on the 17th day of December, 1901, the plaintiffs filed their answer to cross-bill of defendant which was in words and figures as follows, to wit:

Answer to Cross-bill of Defendant.

The plaintiffs herein, Antoinette B. Kinney and Clesson S. Kinney, impleaded in the cross-bill by the defendant, as plaintiffs, but expressly waiving such imperfection, and also expressly waiving the issuance of subpœna, by leave of the court first had and obtained, appear, and, respectively, now and at all times hereafter saving to themselves all and all manner of benefit of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in the cross-bill herein, for answer thereto, or to so much thereof as these plaintiffs, defendants in said cross-bill, are advised it is material or necessary for them to make answer to, answering, say:

(1.) Admit, that the plaintiff in said cross-bill is a corporation organized and existing under the laws of the State of Colorado, and, at the time of the filing of said cross-bill, was a citizen of said State, and that these defendants in said cross-bill are citizens and residents of Salt Lake City, Utah.

(2.) These defendants deny, upon their information and belief, that the matter in dispute in this suit exceeds, exclusive of interests and costs, the sum or value of two thousand ($2,000.00) dollars.

(3.) They admit all the allegations of paragraph three (3) of said cross-bill.

(4.) Admit, that the defendant, plaintiff in the cross-bill, is engaged in the general business of a building and loan association in Colorado, Utah and elsewhere; that, as such, it is composed of persons who become members by subscribing for its stock, of the face value of one hundred ($100.00) dollars per share, receiving a certificate for the shares subscribed and a pass book; that members are either investing or borrowing members, and are mutually interested in

the earnings and prosperity of the association; that investing members pay monthly installments of seventy cents
87 per share on the stock of class "A," and receive credit therefor in the pass book; that borrowing members receive loans and for security execute deeds of trust upon real estate and pledge their stock for the repayment of the loan: But, these defendants to said cross-bill deny that all payments made to the association by all members whether as principal, installments, dues, interest, penalties, or otherwise, go into a common fund, to make valuable and of constantly increasing value their shares of stock, respectively held by them, and deny that borrowing members, according to the by-laws and rules of the association, are required to pay monthly installments of seventy cents per share on twenty-five (25) shares of class "A" stock, with each $2500.00 loan, and the further sum of $23.13 per month, as interest on each $2500.00 loan; and deny that the said installments and interest, are added as they are paid, to the common fund of the association, thus swelling the share of the borrower in said fund by a proportionate amount so paid in and by the profits coming from the reinvestment fund, so accumulated. Deny that no payments or installments or interest, made by the borrower, are credited upon the note, executed by him; deny that a pass book is expressly provided for such purpose, or that the entries therein made show what portion of monthly payments is applied upon stock, and what upon interest. On the contrary, these defendants allege, that, under the by-laws and rules of said association, when a loan is made, the borrower is required to pay monthly to the association one-seventy-second (1/72) of the amount of the loan, less the membership fee, which includes the annual interest on the nominal amount borrowed, at the rate of three per cent., per annum; that the borrower was entitled to pay his loan at any time, and, at the same time, withdraw his stock, in which event, the borrower was entitled to receive the sums paid on the stock, with interest at six per cent., per annum, computed either upon said sums as they were paid monthly, or upon the same with annual rests, or, he is entitled to receive the net value of his stock at the time of withdrawal; that, in either event, he is entitled to receive, by way of credit on his loan, or in money to pay the same, the amount, with interest so paid in upon his stock, or the net withdrawal of the same; that the by-laws expressly limit the interest to be paid upon
88 a loan to three per cent. per annum, and the said association had and has no authority in law, to exact any further or other sum, by way of interest.

And these defendants also deny that all of the payments made to the association, as principal, installments, dues, interest, penalties, or otherwise, go into a common fund, to make valuable and of constantly increasing value, the shares of stock respectively held by the members, as alleged in paragraph four (4) of the cross-bill except in so far as said allegation may apply to the stock of non-borrowing members, and if the matters set out by said allegation, have any other application to non-borrowing members, these defendants say that they have not, nor has either of them, any personal knowl-

edge of the fact, but, for the purposes of this suit, they admit the same to be true, in its application to non-borrowing members.

These defendants admit that an essential part of the plan of building and loan associations is to afford a longer time to pay up, and to allow small payments to be repeated at frequent intervals, but deny that such is the entire scheme or plan of the plaintiff in the said cross-bill; on the contrary, these defendants allege, that the plan of the said plaintiff has been and is, much modified from the general scheme and plan of like associations, and a borrowing member is entitled to pay his loan at any time, and withdraw his stock.

(5.) Defendants admit, that the defendant Antoinette B. Kinney, applied for stock, as alleged in paragraph six of the cross-bill, but deny that such application was in accordance with the plan set forth in paragraph four (4) of the cross-bill, or in accordance with any plan, other than that hereinbefore set forth. Admit that application was approved, and that these defendants delivered to the plaintiff in the cross-bill, their promissory note, as set out in paragraph six.

(6.) These defendants admit that they did, on the 22nd day of November, A. D., 1890, execute and deliver to the plaintiff in the cross-bill, a deed of trust upon the property described and in form and manner, as set out in paragraph seven of the cross-bill.

(7.) These defendants admit that the defendant Antoinette B. Kinney, in addition to the said deed of trust, delivered to the plaintiff in the cross-bill, duly indorsed a certificate of twenty-five
89 (25) shares of class "A" of the stock of the plaintiff of the par value of one hundred ($100.00) dollars each, being certificate No. 1849, in pledge for the payment of the note and interest, according to its tenor.

(8.) And these defendants allege in this behalf, that the said subscription for stock, as aforesaid, although made by and in the name of the defendant, Antoinette B. Kinney, was in fact, for the benefit of both of the defendants, and was made for the purpose of securing the loan aforesaid, and that, at the time thereof, these defendants were, ever since have been and now are, husband and wife.

(9.) These defendants admit, that the plaintiff in the cross-bill, is a holder of the note and trust deed, and is still in possession of the shares of stock, pledged to it as alleged, but they deny that the plaintiff is the legal holder and owner of said note or deed of trust, or is legally in possession of said stock, because they allege the said loan, made by plaintiff in the cross-bill to these defendants has, as they are informed and verily believe, been fully paid and discharged.

(10.) These defendants deny that by the terms of said promissory note and deed of trust, they agree to continue the payment of seventy cents per share on the 5th day of every month upon the twenty-five (25) shares represented by certificate No. 1849, assigned and pledged, as herein admitted, until the same should be fully matured by reason of the earnings of the plaintiff in the cross-bill, making the stock worth full par value; and deny that by the terms

of said note and deed, they, or either of them, agreed to pay interest on said note at the rate of $23.13 per month on the 5th day of each and every month, or at all or at any time until the said stock should mature and become worth par value; on the contrary, these defendants allege that said note and deed were made pursuant to the law and the by-laws of said plaintiff in the cross-bill, and that, upon the making of the loan hereinbefore mentioned, as before set out, these defendants were required to pay, and did pay each month, one-seventy-second (1/72) of the sum of twenty-five hundred ($2500.00) dollars, to wit, $34.38, besides the sum of $6.25, as interest, in all, $40.63 monthly.

90 (11.) These defendants admit, that the said stock has not been withdrawn and has not matured and become par value of one hundred dollars per share, and that its net value was, on August 12, 1900, $2,208.45. But, these defendants allege that they offered to withdraw the said stock and applied to plaintiff to permit the same to be withdrawn prior to the bringing of the original bill herein, but the said plaintiff refused to permit defendants to withdraw said stock, and defendants allege that the said stock, upon the basis of computation made and claimed by the plaintiff in the cross-bill, is now, as they are informed and verily believe, of par value or more.

(12.) These defendants deny that there is due the plaintiff in the cross-bill, on said promissory note, the principal sum of $2500.00, and the further sum of $994.60, as interest, in the aggregate on the 19th day of July, 1900, $3,494.60. And these defendants allege, upon their information had from a reading of the by-laws and note and trust deed, herein mentioned, and their belief, that the allegations made in the cross-bill by the plaintiff therein, of the sums of money alleged to be due from these defendants, as being the amount in controversy in this suit, are fictitious and colorable merely, knowingly made for the purpose of sustaining the jurisdiction of this court.

(13.) These defendants deny that they have, for more than forty-four (44) months prior to the time of the filing of the cross-bill herein, failed to pay to the plaintiff the sum of $40.63, in monthly installments; and deny that they ever paid, at any time, $23.13, being part of the monthly sums paid by them, as monthly interest upon their said note. On the contrary, they allege that, beginning with January A. D., 1891, for sixty-seven (67) months following and until and including July A. D., 1896, they paid on account of said note and trust deed and stock, the sum of $40.63, each month; that thereupon, through error or inadvertence, they failed to make payments, as aforesaid, for a period of twenty-four (24) months, but no default therefor was declared, and afterwards, with the consent of the plaintiff in the cross-bill, resumed payments, and thereupon paid to the plaintiff in the cross-bill in the year A. D., 1898, during each of the months of August, September, October and No-

91 vember, the sum of $40.63 and in the month of December, the sum of $17.50; that all of said sums of money were received by the plaintiff in the cross-bill, and entered in the pass book

of these defendants by the agents of the plaintiff, sometimes in the full sum of each payment under the head of "Totals," and sometimes they were arbitrarily apportioned by the plaintiff as follows, to wit: "$17.50 under the head of monthly interest, and $23.13 under the head of interest and dues;" but these defendants say that said apportionment was not authorized by the contract and the law.

(14.) And these defendants allege, that they have fully paid, satisfied and discharged the said loan, made by the plaintiff in the cross-bill to them, principal and interest.

Wherefore, these defendants in the cross-bill, having fully answered, confessed, traversed, avoided or denied all the matters in the said cross-bill material to be answered, according to their best knowledge and belief, humbly pray that this honorable court do enter its decree that these defendants be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained, and for such further and other relief in the premises as is meet and in accordance with equity.

(Signed) ANTOINETTE B. KINNEY,
CLESSON S. KINNEY,
Defendants in Cross-bill.

RICHARDS AND VARIAN,
Solicitors for said Defendants.

Service of within answer admitted with copy this 17th day of December, A. D., 1901.

(Signed) J. NORMAN,
A. J. RISING,
STEPHENS & SMITH,
Solicitors for Plaintiff in Cross-bill.

Filed in U. S. circuit court, district of Utah, Dec. 17, 1901.
JERROLD R. LETCHER, *Clerk.*

92–103 And afterwards, and on December 28th, 1901, the defendant filed its replication to answer to cross-bill of defendant, which was in words and figures as follows, to wit:—

Replication to Answer to Cross-bill of Defendant.

To the judges of the circuit court of the United States for the district of Utah:

This repliant, The Columbia Savings and Loan Association (a corporation), saving and reserving to itself all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said plaintiffs for replication thereunto, saith, that it doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in the law to be answered unto by the said plaintiffs, and that the answer of the said plaintiffs is very uncertain, evasive, and insufficient in law, to be replied unto by this repliant; without that,

that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

(Signed) A. J. RISING,
STEPHENS & SMITH &
J. NORMAN,
Solicitors for Defendant.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

T. J. Zollars, being duly sworn, deposes and says: I am the president of the defendant, The Columbia Savings and Loan Association. So much of the foregoing replication as concerns my own acts and deeds is true to the best of my own knowledge; and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

(Signed) T. J. ZOLLARS.

Subscribed and sworn to before me this 21st day of December, A. D., 1901.

My commission expires January 20, 1903.

(Signed) BESSIE THOMPSON,
Notary Public.

Filed Dec. 28, 1901.

JERROLD R. LETCHER, *Clerk.*

104 And afterwards and on to wit the 7th day of June, 1902, the following decree was made and entered of record in this court, to wit:

Decree.

This cause came on to be heard and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, to wit:

That the court finds for the defendant, The Columbia Savings and Loan Association; and that the amended answer and cross-bill, and the allegations and averments therein contained and set forth, are true; and that the sum of four thousand three dollars and forty-five cents ($4,003.45) is due and owing from the plaintiffs, Antoinette B. Kinney and Clesson S. Kinney, and each of them to the defendant, The Columbia Savings and Loan Association, a corporation, on and because of the matters in said amended answer and cross-bill mentioned, the same arising as follows:

On the promissory note mentioned in said amended answer and cross-bill, the sum of twenty-five hundred dollars ($2500); together with the further sum of fifteen hundred three dollars and forty-five cents ($1503.45) for sixty-five (65) monthly installments of twenty-

three dollars and thirteen cents ($23.13) each for interest, according to the by-laws of defendant corporation, the same being interest installments for each month, from November 19th, 1896, to April 19th, 1902.

That said defendant, The Columbia Savings and Loan
105 Association, a corporation, has a lien to the amount of said sum so found to be due and owing to it from said plaintiffs, on the personal property in said amended answer and cross-bill mentioned and described to wit: twenty-five (25) shares of the capital stock of defendant association, represented by certificate No. 1849, class "A," issued in the name of the plaintiff, Antoinette B. Kinney, which said certificate was endorsed and delivered by said plaintiff to, and is now held by said defendant as collateral security for the payment of said sum so found to be due and owing from said plaintiffs to said defendant; and that said defendant has a lien upon the real property mentioned and described in said amended answer and cross-bill, to wit: Commencing eight (8) rods east of the N. W. corner of lot five (5), block thirty (30), plat "B," Salt Lake City survey, thence south ten (10) rods, east two (2) rods, north ten (10) rods, west two (2) rods to place of beginning, containing twenty (20) sqr. rods, with strip of land six (6) feet wide and ten (10) rods long immediately adjoining said described land on east side, for private driveway; but reserving a strip of land six (6) feet wide and ten (10) rods long on east side of said described property for private driveway, said driveway to be used only by parties immediately adjoining on E. & W. of said driveway; to the amount of said sum so found to be due and owing to it, and interest and costs.

And it is further ordered, adjudged and decreed, that plaintiffs' bill of complaint be dismissed and that the said plaintiffs Antoinette B. Kinney and Clesson S. Kinney, within thirty (30) days from the date of this decree, pay to the said defendant, The Columbia Savings and Loan Association, the said sum of four thousand three dollars and forty-five cents ($4,003.45), with interest thereon at the rate of eight (8) per cent per annum from April 19th, 1902, until paid; and also all costs in this suit expended; and that in default of such payment, the said twenty-five (25) shares of said capital stock, class "A," and the said real estate, to wit: commencing
106 eight (8) rods east of the N. W. corner of lot five (5), block thirty (30), plat "B," Salt Lake City survey, thence south ten (10) rods, east two (2) rods, north ten (10) rods, west two (2) rods to place of beginning, containing twenty (20) sqr. rods, with strip of land six (6) feet wide and ten (10) rods long immediately adjoining said described land on east side, for private driveway; but reserving a strip of land six (6) feet wide and ten (10) rods long on east side of said described property for private driveway, said driveway to be used only by parties immediately adjoining on E. &. W. of said driveway; situate in the city of Salt Lake, and county of Salt Lake, in the State of Utah; with all the appurtenances thereunto belonging, be sold at public auction at the front door of the county courthouse, in the county of Salt Lake and State of Utah, for the purpose

of realizing the amount so found to be due and owing to said defendant; together with interest and costs.

And be it further ordered, that before making said sale, notice of time, place and terms of sale and of the property to be sold by advertisement in some newspaper printed, regularly issued, and having a general circulation in said county of Salt Lake, in the State of Utah, shall be given by the publication thereof once a week for at least four (4) weeks next preceding the date of sale.

And it is further ordered, that said twenty-five (25) shares of stock shall not be sold for less than twenty-three hundred eighty dollars and eighty-five cents ($2,380.85) with interest thereon at six (6) per cent. per annum from April 12th, 1902, to date of sale; the above amount being the stipulated value between the parties hereto of said twenty-five (25) shares of stock on April 12th, 1902.

And it is further ordered, that, in making said sale, the
107 said capital stock shall be first offered for sale and sold to the highest and best bidder for cash in hand, but shall not be sold for less than its stipulated value as hereinbefore provided; and that, in the event that said capital stock should not bring an amount sufficient to satisfy defendant's demand as hereinbefore set forth, together with interest and costs, then in such case only the officer making the sale shall proceed to offer and sell said real estate, or so much thereof as may be necessary for such purpose, to the highest and best bidder for cash.

And that the master in making the sale of the real estate herein mentioned shall offer the same in convenient parcels, if it can be sold to better advantage by being so divided, and only so much thereof as may be necessary to realize the amount found to be due to the cross-complainant herein, with interest and costs as aforesaid, shall be offered for sale and sold; and that any party may become the purchaser or purchasers at said sale.

It is further ordered, adjudged and decreed by the court, that Samuel H. Lewis, the master in chancery of this court, be and he is hereby appointed to execute this decree and to sell said capital stock and said lands and tenements; and that said master shall report the sale to this court, and upon confirmation there*for*, pay out of the proceeds of sale the costs and expenses thereof, then the costs of suit, and that the remainder of said proceeds shall be applied to the payment of the amount hereinbefore found to be due and owing to the defendant, The Columbia Savings and Loan Association;

It is further ordered, adjudged and decreed that upon the confirmation of said sale by the master, said master is directed to make unto the purchaser, or purchasers, of said capital stock, and assignment thereof, and unto the purchaser or purchasers of said lands, or any portion thereof, certificates of sale thereof according to law, said sale of said real estate to be subject to the right of redemp-
108 tion by said Antoinette B. Kinney and Clesson S. Kinney, or either of them or of any person, or persons, claiming by through or under them, the said stock to be transferred and delivered immediately after said confirmation; and that upon the transfer and delivery of said stock and after the period allowed by law for

the redemption of the real estate so sold said Antoinette B. Kinney and Clesson S. Kinney, and all persons claiming by through or under them, be foreclosed and barred of all right, title and interest in and to said stock and in and to said real estate so sold by said master, or any part thereof.

It is further ordered, adjudged and decreed by the court that upon the expiration of the period of redemption of said real estate so sold as aforesaid, said master shall execute a deed, or deeds to the purchaser or purchasers, at said sale, and that any person or persons holding or claiming to hold possession of said property, or any part thereof, shall deliver the possession of said premises to the purchaser, or purchasers, upon presentation of the deed of said master therefor.

It is further ordered that in case there be a surplus after making the payments aforesaid out of the proceeds of said sale, the said master pay the same into the registry of this court, and that in case of a deficiency in the amount required to be paid by this decree, the said master shall report the amount of such deficiency to this court and said Columbia Savings and Loan Association shall have, upon application to the court, judgment and execution against said Antoinette B. Kinney and Clesson S. Kinney for the same.

It is further ordered and decreed that any party to this proceeding may apply to the court for further order and direction at the foot of this decree.

J. A. MARSHALL, *Judge.*

Dated June 7th, 1902.

Filed June 7, 1902.
JERROLD R. LETCHER, *Clerk.*

109 And afterwards and on the 7th day of June, 1902, the plaintiffs filed their petition for an order, in words and figures as follows:—

Petition of Complainants for an Order Allowing an Appeal from the Final Decree Dismissing Plaintiffs' Bill of Complaint and Decreeing in Favor of the Above-named Defendant and against These Complainants upon the Cross-bill Herein, Heretofore Entered in This Cause, to the Supreme Court of the United States, and for a Supersedeas.

Antoinette B. Kinney and Clesson S. Kinney, complainants in the above-entitled cause and defendants in the cross-bill herein, feeling themselves aggrieved by the final decree, heretofore made and entered by this court in this cause on the seventh day of June, A. D., 1902, whereby it was ordered, adjudged and decreed that the said original bill of these complainants be dismissed, and that the said defendant, The Columbia Savings and Loan Association, plaintiff in the said cross-bill, have a decree of foreclosure against the said complainants, Antoinette B. Kinney and Clesson S. Kinney, and their property therein described, with judgment in the sum of four thou-

sand and three dollars and for costs, come now, by Charles S. Varian and Franklin S. Richards, their solicitors, and petition this court for an order allowing them, the said complainants, to prosecute an appeal on the said final decree, to the honorable, the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided, upon the single question of the jurisdiction of this court, presented by the record made originally in the State court, and the petition of removal therefrom to this court, and the two motions to remand said cause from this court to the State court, with the orders thereupon made sustaining the jurisdiction of this court, as the same are specified in the assignment of errors filed herein.

And said complainants pray for the usual certificate to the said Supreme Court of the United States, setting forth so much of the record and proceedings as may be necessary to present the fact that the jurisdiction of this court was and is a matter in issue herein; and for an order fixing the amount of security for costs and damages and also as a supersedeas pending said appeal, and that, upon the giving of such security to the approval of the court, all further proceedings in this court be superseded and stayed until the determination of said appeal by the said United States Supreme
110 Court; and that so much of the record and proceedings herein as may be necessary be certified and transmitted to the said court, as provided by law and the rule thereof.

And your petitioners will ever pray.

(Signed) CHARLES S. VARIAN,
FRANKLIN S. RICHARDS,
Solicitors for Complainants.

Filed June 7, 1902.

JERROLD R. LETCHER, *Clerk.*

And afterwards, on the same day an order was made by the judge of said court, which was in words and figures, as follows, to wit:—

Order Allowing an Appeal.

Upon motion of Charles S. Varian, Esq., solicitor for Antoinette B. Kinney and Clesson S. Kinney, complainants herein, and upon filing the petition of said complainants for an order allowing an appeal, together with an assignment of errors,

It is ordered, that an appeal be, and is hereby allowed, to the United States Supreme Court, from the final decree entered herein on the 7th day of June, A. D., 1902, dismissing complainants' bill, and decreeing in favor of the defendant, plaintiff in the cross-bill, herein, for the recovery of money, and the foreclosure, as therein prayed, against the complainants, defendants in said cross-bill, upon the single question of the jurisdiction of this court; that the amount of the bond upon said appeal, for the payment of costs and damages and as a supersedeas, be, and hereby is fixed at the sum of $750.00 *dollars.*

(Signed) J. A. MARSHALL, *Judge.*

Filed June 7, 1902.

JERROLD R. LETCHER, *Clerk.*

111 And afterwards and on to wit, the 7th day of June, 1902, said plaintiffs filed their assignment of errors herein, which was in words and figures as follows, to wit:

Assignment of Errors.

Come now Antoinette B. Kinney and Clesson S. Kinney, complainants herein, and file the following assignment of errors, upon which they will rely upon appeal to the Supreme Court of the United States:

1. The circuit court of the United States for the district of Utah, erred in overruling complainants' motion to remand this cause to the district court of the third judicial district of the State of Utah, in and for the county of Salt Lake, by order made and entered on the sixth day of January, A. D. 1900; because it sufficiently appeared by the petition for removal, and the record in said cause, that the said circuit court had not jurisdiction in this suit.

2. The said circuit court erred, in permitting The Columbia Savings and Loan Association, defendant herein, to amend in the said circuit court, its petition for removal of said cause from the said State court, by adding thereto the statement that these complainants were, at the time of the commencement of this suit and still are, citizens and residents of the city of Salt Lake, State of Utah, by its order made and entered herein on the sixth day of January, 1900; because it sufficiently appeared by the said petition
112 for removal and the record herein, that the said circuit court had not jurisdiction of this cause, by reason of diverse citizenship of the parties, and had not jurisdiction to permit such amendment.

3. The said circuit court erred in permitting the said defendant, by its order made and entered on the sixth day of January, 1900, to amend its answer and cross-complaint, by adding, on pages five and six thereof, a statement that, at the time of the commencement of this suit, the said defendant was, and ever since has been, a corporation organized under and a citizen and resident of the State of Colorado, and that the complainants herein, at the time of the commencement of this suit, were and ever since have been citizens of the State of Utah; because it sufficiently appeared by the said petition for removal and the record herein, that the said circuit court had not jurisdiction of this cause, by reason of the diverse citizenship of the parties, and had not jurisdiction to permit such amendment to be made.

4. The said circuit court erred, in overruling complainants' second motion to remand said cause to the said State court, by its order made and entered on the twenty-third day of April, 1900; because it sufficiently appeared by the petition for removal and the record herein, that the said circuit court had not jurisdiction of this cause by reason of diverse citizenship of the parties and that the said State

court had never lost and still retains jurisdiction of the cause and parties.

5. The said circuit court erred, in making and passing its decree, made and entered on the seventh day of June, A. D. 1902,
113 adjudging a foreclosure of the trust deed or mortgage in the original and cross bills mentioned and set out in favor of the defendant, The Columbia Savings and Loan Association, plaintiff in the cross-bill, and against these complainants, Antoinette B. Kinney and Clesson S. Kinney, defendants in said cross-bill, and against the property of said complainants in said bills described, for the payment of the sum of money, as awarded by said decree, amounting to four thousand & three dollars, together with costs, and in adjudging a recovery of any deficiency in the premises, and in finally dismissing the original bill of these complainants; because it sufficiently appeared by all the record herein, including the petition for removal of said cause from the said State court to this court, that the said circuit court here had and has no jurisdiction to try and determine this cause, or to make and enter final decree therein, but, on the contrary, as shown by said record, this suit has not been transferred from said State court to this said circuit court, pursuant to the acts of Congress in that behalf made and provided, and the said State court ever since has and still has jurisdiction of said suit and the parties thereto.

Wherefore, the said Antoinette B. Kinney and the said Clesson S. Kinney, complainants and appellants herein, pray that the decree and judgment in this suit of the circuit court of the United States for the district of Utah, be reversed; that the several orders of said circuit court, refusing to remand the cause to the said State court, and in permitting amendments to be made to the petition for removal and the answer and cross-complaint herein, be likewise reversed, and that the said cause be remanded to the said circuit court, with directions to remand the same to the district court of the third judicial district of the State of Utah, in and for the county of Salt Lake.

Filed June 7, 1902.

CHARLES S. VARIAN,
FRANKLIN S. RICHARDS,
Solicitors for Complainants and Appellants.

114 And afterwards and on the same day, the following certificate was filed in this court and cause, which is in words and figures following to wit:

Certificate of the Question of Jurisdiction upon an Appeal to the Supreme Court of the United States.

This cause was in equity, and came into this court upon removal thereof from the district court of the third judicial district of the State of Utah, in and for the county of Salt Lake. The complaint of the plaintiffs was filed in the State court on the 25th day of August, A. D. 1899, and the summons was served in the county of

Salt Lake, State of Utah, on the 24th day of August, 1899. The defendant was impleaded by the name of "The Columbia Building and Loan Association," and, before answer or other plea and in due time, filed its petition and bond for the removal of the cause in the State court on September 2, 1899, in its proper name, the Columbia Savings and Loan Association, and thereupon on said day, an order removing said cause to this court was made by the said State court, and the transcript of the record was filed in this court on the 28th day of November, 1899. The petition for removal was, after the title of court and cause, as follows, to wit:

"To the honorable district court of the third judicial district in and for the county of Salt Lake and State of Utah:

"Your petitioner, The Columbia Savings and Loan Association, respectfully shows to this honorable court, that the matter and amount in dispute in the above-entitled suit, exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

"That the controversy in said suit is between citizens of different States, and that your petitioner, the defendant in the above-entitled suit was, at the time of the commencement of this suit and still is, a resident and a citizen of the city of Denver and State of Colorado.

"And your petitioner offers herewith a good and sufficient surety for its entering in the circuit court of the United States for the district of Utah, on the first day of the next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

"And it prays this honorable court to proceed no further herein, except to make the order of removal, required by law, and to
115 accept said surety and bond, and to cause the record herein to be removed to said circuit court of the United States in and for the district of Utah, and it will ever pray."

The bond on removal stated: "That the Columbia Savings and Loan Association, a corporation of Denver, of Colorado, as principal," with its surety, made the bond, and contained no other statement of or concerning the citizenship and residence of either of the parties to the suit, at the then present time, or at the time of the commencement of the suit; and neither the complaint of the plaintiffs, nor the summons issued in the suit contain or set out any statement of fact of or concerning the citizenship or residence of either of the parties, other than the following, contained in said complaint: "That, at all times hereinafter mentioned, the defendant was and now is, a corporation organized and existing under the laws of the State of Colorado."

The complaint of plaintiffs was a bill in equity, brought to procure an accounting between the plaintiffs and the defendant, and to redeem the property of the plaintiffs, situate in the State of Utah, from the lien of a trust deed or mortgage theretofore executed by the plaintiffs to defendant. The case, as made by the complaint, did not, in anywise, involve the construction or application of the Constitution of the United States, and did not draw in question the

constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, and did not contain any claim that the Constitution or any law of any State was in contravention of the Constitution of the United States.

On the 28th day of November, 1899, the defendant filed in this court, an answer and cross-complaint, in form in one pleading, and by the said cross-complaint sought a foreclosure of the trust deed or mortgage, mentioned in and the subject of plaintiffs' suit to redeem. Thereupon, the plaintiffs moved to remand the cause to the State court, on the ground that the requisite diversity of citizenship between the parties at the time of the commencement of the suit, and at the time of the filing of the petition for removal in the State court, was not made to appear sufficiently, and said motion came on to be heard by this court, with the Honorable John A. Riner, district judge, presiding; the motion to remand the cause to the
116 said State court was, on the 6th day of January, A. D., 1900, overruled and denied, and thereupon, on said day upon the application of the defendant, an amendment was allowed and made to the said petition for removal, by adding thereto the statement: "That the complainants were, at the commencement of the suit and still are, citizens and residents of the city of Salt Lake, State of Utah;" and an amendment was also allowed and made to the cross-complaint of defendant, theretofore filed, by adding thereto the statement: "First. That your orator, at the time of the commencement of this suit, was, and ever since then and now is, a corporation organized and existing under and by virtue of the laws of the State of Colorado, and a citizen and resident of the city of Denver and State of Colorado, and that the said plaintiffs, Antoinette B. Kinney and Clesson S. Kinney, at the time of the commencement of this suit were and ever since have been and still are, citizens of the State of Utah, and residents thereof, residing at the city of Salt Lake, and the said State of Utah: Second. Your orator further avers that this is a controversy between citizens of different States, and that more than two thousand dollars, exclusive of interest and costs, is involved therein."

Afterwards, by leave of the court had and obtained, the complainants were permitted to make a second motion to remand said cause to the said State court, for the reasons, as aforesaid, that the petition for removal and the record in the State court, at the time of filing said petition and of the making of the order of removal, as aforesaid, failed to show that the complainants and the defendant were, at the time of the commencement of said suit and at the time of the filing of the petition for removal and the making of the order for the same, citizens of different States, which said motion came on regularly to be heard before the court, with the Honorable John A. Marshall, district judge, presiding, and the said court, on the 23rd day of April, A. D., 1900, did overrule and deny said motion, for the reason only that the matter presented by said motion had been, theretofore, regularly heard and decided, and a similar motion to remand had been overruled and denied by another judge, with co-ordinate jurisdiction and powers, holding this court; and thereupon,

the pleadings of the respective parties were recast, so that the cause came on finally for a hearing before the court, upon the
117 original bill by the complainants, to redeem complainants' property from the lien of the trust deed or mortgage, answer and replication thereto, and the cross-bill of the defendant, to foreclose said trust deed or mortgage, answer and replication thereto, and a stipulation of facts and certain documentary evidence, whereupon, after a full hearing, the court made and passed its decree on the 7th day of June, 1902, finally dismissing the original bill of complainants, and directing a recovery by the defendant from complainants of the sum of four thousand and three dollars, found to be due, with costs, and foreclosing the said trust deed or mortgage, the security for the payment thereof;

Now, therefore, an appeal to the Supreme Court of the United States, upon the single question of the jurisdiction of this court in the premises having been prayed by complainants and allowed in open court, and an assignment of errors having been regularly filed with the prayer for said appeal, upon application of the solicitors for complainants, it is certified, that the foregoing is a full and complete statement of all facts appearing anywhere in the record in this cause, upon the question of jurisdiction, on the ground of diverse citizenship of the respective parties, and *that* the question whether this circuit court of the United States for the district of Utah, upon the petition and bond for removal of said cause from the State court, and the record of the cause in said State court, and the amendments to the record in this court, could take jurisdiction thereof upon the sole ground of the diverse citizenship of the parties; and this is the only question of law upon the pleadings and record for the decision of the Supreme Court of the United States.

In witness whereof, the judge holding said circuit court of the United States for the district of Utah, has hereunto set his hand this 7th day of June, A. D., 1902, being a day of the same term of the court in which the said decree was passed and entered.

(Signed) J. A. MARSHALL,
U. S. District Judge.

Filed June 7—1902.

JERROLD R. LETCHER, *Clerk.*

118 And afterwards and on to wit the 30th day of June, 1902, bond on appeal was filed in this court and cause, which is in words and figures following to wit:

Bond on Appeal.

Know all men by these presents, that we, Antoinette B. Kinney and Clesson S. Kinney, both now of the city and county of Salt Lake, State of Utah, as principals, and Utah Savings & Trust Co., a corporation, as surety, are held and firmly bound unto The Columbia Savings and Loan Association, a corporation, respondent above named, in the full and just sum of seven hundred and fifty ($750.00) dollars, to be paid to said The Columbia Savings and Loan Associa-

tion, a corporation, its successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 30th day of June, in the year of our Lord, one thousand nine hundred and two.

Whereas, lately, at a session of the circuit court of the United States, for the district of Utah, in a suit pending in said court, between the said Antoinette B. Kinney and Clesson S. Kinney, complainants, and The Columbia Savings and Loan Association, a corporation, respondent, a decree was rendered against the said Antoinette B. Kinney and Clesson S. Kinney, and the said Antoinette B. Kinney and the said Clesson S. Kinney, having obtained from said court an order, in open court, allowing an appeal to the Supreme Court of the United States, to reverse *and* decree of the aforesaid suit, and an order fixing the amount of a supersedeas in the premises:

Now, therefore, the conditions of the above obligation is such that, if the said Antoinette B. Kinney and the said Clesson S. Kinney shall prosecute their said appeal to effect, and shall answer all damages and costs that may be awarded against them, and shall pay all just damages for the use and detention of the prop-
119 erty in suit, pending the said appeal, if they fail to make their plea good, then the above obligation is to be void, otherwise, to remain in full force and virtue.

(Signed) ANTOINETTE B. KINNEY. [SEAL.]
CLESSON S. KINNEY, [SEAL.]
UTAH SAVINGS & TRUST CO., A CORPORATION,
By S. H. LYNCH, *Mgr.* [SEAL.]

Approved:
J. A. MARSHALL, *Judge.*

Filed June 30, 1902.
JERROLD R. LETCHER, *Clerk.*

And afterwards and on the 7th day of July, 1902, a stipulation as to amendment of certificate of record on appeal was filed in this court and cause, being in words and figures following, to wit:

Stipulation as to Amendment of Certificate of Record on Appeal.

It is hereby stipulated that the certificate of record on appeal to the Supreme Court of the United States on the question of jurisdiction filed in this action on June 7th, 1902, be and the same is hereby amended so as to show that on January 2nd, 1900, the defendant gave notice of its intention to move at the hearing on motion to remand for leave to amend petition for removal. That the same was filed with the proposed amendment, as stated in said certificate January 3rd, 1900. That on January 4th, 1900, the motion to remand was argued and submitted.

That on January 6th, 1900, the following decision was made, and order entered:

120 "At this day comes the defendant, by J. Norman, its solicitor, and the motion of said plaintiff to remand this suit to the third district court of the third judicial district of the State of Utah, in and for Salt Lake county, from whence it was removed to this court, having heretofore come on to be heard, and having been argued by counsel and submitted, and by the court taken under advisement, and the court being now well advised in the premises doth grant leave to said defendant to file amendment to its petition for removal herein, and its amendment to the cross-complaint in this suit, and doth deny the motion to remand this suit to the district court."

(Signed) C. S. VARIAN,
F. S. RICHARDS,
Solicitors for Plaintiff.
J. NORMAN,
Solicitor for Defendant.

STEPHENS & SMITH, *Of Counsel.*

Filed July 7, 1902.
JERROLD R. LETCHER, *Clerk.*

121-123 And afterwards and on the same day, pursuant to a stipulation on file herein, the following order was made in said cause, being in words and figures following to wit:

Order Allowing Amendment of Certificate of Record on Appeal.

At this day come the parties hereto by their respective attorneys,—C. S. Varian appearing for said plaintiffs and F. B. Stephens appearing for said defendant—whereupon, by virtue of the stipulation filed herein, it is ordered that the certificate of record on appeal to the Supreme Court of the United States on the question of jurisdiction filed in this action on June 7, 1902, be and the same is hereby amended so as to show that on January 2nd, 1900, the defendant gave notice of its intention to move at the hearing on motion to remand for leave to amend petition for removal. That the same was filed with the proposed amendment, as stated in said certificate, January 3rd, 1900. That on January 4th, 1900, the motion to remand was argued and submitted. That on January 6th, 1900, the following decision was made and order entered: "At this day comes the defendant by J. Norman its solicitor, and the motion of said plaintiff to remand this suit to the third district court of the third judicial district of the State of Utah, in and for Salt Lake county, from whence it was removed to this court, having heretofore come on to be heard, and having been argued by counsel and submitted and by the court taken under advisement, and the court being now well advised in the premises, doth grant leave to said defendant to file amendment to its petition for removal herein, and its amendment to the cross-complaint in this suit, and doth deny the motion to remand this suit to the district court."

* * * * * * *

124 UNITED STATES OF AMERICA, } ss:
District of Utah, }

I, Jerrold R. Letcher, clerk of the United States circuit court for the district of Utah, do hereby certify that the foregoing pages, numbered from 1 to 123, both inclusive, contain a full, true and complete transcript of all the pleadings, proceedings and record entries, with the exception of the following papers and entries, to wit:

Notice by defendant of docketing of cause.

Order setting hearing motion to remand for Jan. 2.

Order leave to plaintiff to amend bill by making trustee a party and to conform to practice of court.

Order extending time on order of Jan. 8 to Mar. 1.

Stipulation for above order.

Order giving plaintiff 15 days' additional time to reform bill.

Setting for hearing motion leave to renew motion remand.

Order setting motion to renew & to remand for hearing.

Entering hearing motion to remand argued & under advisement.

Stipulation as to reformation of bill in equity.

Order allowing plaintiff 30 days in which file amended bill.

Stipulation as to answer of def't & taking of testimony.

Motion to strike answer & cross-complaint from files.

Notice of motion to file cross-complaint.

Entering submission motion to strike answer & cross-complaint from files.

Order motion to strike sustained & defendants given Oct. 1 to file separate answer and cross-complaint.

Amended answer of defendant.

Plaintiffs' exceptions to amended answer.

Entry order exceptions to answer argued & under advisement.

Order allowing 1st & 2nd and disallowing 3rd exceptions & defendant to answer over.

Notice of motion for order appointing special examiner.

Order motion to appoint examiner be withdrawn.

Stipulation extending time take testimony & order as to same.

Plaintiffs' testimony before examiner.

Order setting cause for Dec. 28.

Order leave plaintiff file answer to defendant's cross-bill and amendment to stipulation of facts.

Amendment to stipulation of facts.

Order postponing trial to Dec. 30.

Plaintiffs' requests for instructions.

Order trial cause submitted on depositions & stipulation of facts on briefs.

Stipulation *in re* value & sale stock filed also affidavit as to value of stock.

Stipulation *in re* bid at sale of stock.

in a certain cause adjudicated in said court wherein Antoinette B. Kinney and Clesson S. Kinney were plaintiffs, and The Columbia Savings and Loan Association, a corporation, was defendant, as full,

true and complete as the originals of the same now remain on file and record in my office.

125 I further certify that the bond on appeal was filed herein at and during the same term of said court in which the decree herein was rendered.

Seal United States Circuit Court, District of Utah.

In testimony whereof, I have hereunto affixed my official signature, and the seal of said court, at Salt Lake City, in said district, on this 18th day of July, A. D., 1902, and the 127th year of the Independence of the United States of America.

JERROLD R. LETCHER,
Clerk U. S. Circuit Court, District of Utah.

126 In the Supreme Court of the United States.

ANTOINETTE B. KINNEY and CLESSON S. Kinney, Appellants, *vs.* THE COLUMBIA SAVINGS AND LOAN Association, a Corporation, Respondent.	No. 368, Oct., 1902, Term.

Precipe for Printing Record, and Statement of Errors.

To the clerk of said court:

The appellants herein will rely upon the following errors, fully appearing in the transcript of the record, heretofore certified to this court:

1. The circuit court of the United States for the district of Utah, erred in overruling appellants' motion to remand this cause to the district court of the third judicial district of the State of Utah, in and for the county of Salt Lake, by order made and entered on the sixth day of January, A. D., 1900; because it sufficiently appeared by the petition for removal, and the record in said cause, that the said circuit court had not jurisdiction in this suit.

2. The said circuit court erred, in permitting The Columbia Savings and Loan Association, respondent herein, to amend in the said circuit court, its petition for removal of said cause from the said

127 State court, by adding thereto the statement that these appellants were, at the time of the commencement of this suit, and still are, citizens and residents of the city of Salt Lake, State of Utah, by its order made and entered herein on the sixth day of January, 1900; because it did not sufficiently appear by the said petition for removal and the record herein, that the said circuit court had jurisdiction of this cause, by reason of diverse citizenship of the parties, and had jurisdiction to permit such amendment.

3. The said circuit court erred in permitting the said respondent, by its order made and entered on the sixth day of January, 1900, to amend its answer and cross-complaint, by adding, on pages five and six thereof, a statement that, at the time of the commencement of this suit, the said respondent was, and ever since has been,

a corporation organized under and a citizen and resident of the State of Colorado, and that the appellants herein, at the time of the commencement of this suit, were and ever since have been, citizens of the State of Utah; because it did not sufficiently appear by the said petition for removal and the record herein, that the said circuit court had jurisdiction of this cause, by reason of the diverse citizenship of the parties, and had jurisdiction to permit such amendment to be made.

4. The said circuit court erred, in overruling appellants' second motion to remand said cause to the said State court, by its order made and entered on the twenty-third day of April, 1900; because it sufficiently appeared by the petition for removal and the record herein, that the said circuit court had not jurisdiction of this cause, by reason of the diverse citizenship of the parties and that the said State court had never lost and still retains jurisdiction of the cause and parties.

5. The said circuit court erred, in making and passing its
128 decree, made and entered on the 7th day of June, A. D. 1902, adjudging a foreclosure of the trust deed or mortgage in the original and cross-bills mentioned, and set out, in favor of the respondent, The Columbia Savings and Loan Association, plaintiff in the cross-bill, and against these appellants, Antoinette B. Kinney and Clesson S. Kinney, defendants in said cross-bill, and against the property of said complainants in said bills described, for the payment of the sum of money, as awarded by said decree, amounting to four thousand and three ($4,003.00) dollars, together with costs, and in adjudging a recovery of any deficiency in the premises, and in finally dismissing the original bill of these appellants; because it sufficiently appeared by all the record herein, including the petition for removal of said cause from the said State court to this court, that the said circuit court here had not and has not jurisdiction to try and determine this cause, or to make and enter final decree therein, but on the contrary, as shown by said record, this suit has not been transferred from said State court to this said circuit court, pursuant to the acts of Congress in that behalf made and provided, and the said State court ever since has had and still has, jurisdiction of said suit and the parties thereto.

The clerk will cause to be printed, the following parts of the transcript of record herein:

(1.) Complaint and summons in State court.

(2.) Petition and bond on removal.

(3.) Answer and cross-complaint of defendant, filed in circuit court November 28, 1899.

(4.) Motion to remand.

(5.) Notice of motion for leave to amend motion to remand.

(6.) Notice of motion for leave to amend petition for removal and cross-complaint.

(7.) Minute entry of hearing of motions.

(8.) Order granting leave to amend petition for removal and cross-complaint, and denying motion to remand.

(9.) Amendments to petition for removal and cross-complaint.

(10.) Petition for leave to renew motion and notice to remand cause.
(11.) Order denying second motion to remand.
(12.) Opinion of court on same.
129 (13.) Reformed bill of plaintiffs.
(14.) Answer and cross-bill of defendant.
(15.) Amended answer of defendant, filed December 1, 1901.
(16.) Plaintiffs' replication.
(17.) Plaintiffs' answer to cross-bill.
(18.) Defendant's replication to answer to cross-bill.
(19.) Decree.
(20.) Petition for appeal and supersedeas.
(21.) Assignment of errors.
(22.) Order allowing appeal and fixing bond.
(23.) Certificate of jurisdiction.
(24.) Bond on appeal.
(25.) Stipulation to amend certificate, and order upon the same.
(26.) Certificate of clerk to transcript of record.

Respectfully,

CHARLES S. VARIAN,
F. S. RICHARDS,
Solicitors for Appellants.

Dated July 25", 1902.

Copy of within statement served upon us at Denver, Colorado, this 30th day of July, 1902.

J. NORMAN,
Solicitors for Respondent.

[Endorsed:] Original. 398 18626.
130 [Endorsed:] File No. 18,626. Supreme Court U. S. October term, 1902. Term No. 398. Antoinette B. Kinney *et al.*, app'ts, *vs.* The Columbia Savings and Loan Ass'n. Statement of errors & designation by app'ts of parts of record to be printed. Filed August 6, 1902.

Endorsed on cover: File No. 18,626. Utah C. C. U. S. Term No. 398. Antoinette B. Kinney and Clesson S. Kinney, appellants, *vs.* The Columbia Savings and Loan Association. Filed July 26th, 1902.

* * * * * * *

And afterwards on the same day said defendant also filed *their* order of removal, which is in words and figures as follows, to wit:

Order of Removal.

The defendant herein having, within the time provided by law, filed his petition for the removal of this cause to the circuit court of the United States for the district of Utah, and having at the same time offered its bond in the sum of one thousand ($1,000) dollars, with the United States Fidelity & Guaranty Company, a corporation, as surety, pursuant to statute, and conditioned according to law:

Now therefore this court does hereby accept and approve said bond and accept said petition, and does order that this cause be removed for trial to the next circuit court of the United States for the district of Utah, pursuant to the statute of the United States, and that all proceedings of this court be stayed.

Dated this 2nd day of September, 1899.

* * * * * * *

FILED
FEB 24 1903
JAMES H. McKENNEY,
Clerk

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

No. 102.

ANTOINETTE D. KINNEY AND CLESSON S. KINNEY,
APPELLANTS,

vs.

THE COLUMBIA SAVINGS AND LOAN ASSOCIATION,
APPELLEE.

BRIEF FOR APPELLANTS.

CHARLES S. VARIAN,
For Appellants.

FRANKLIN S. RICHARDS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

No. 398.

ANTOINETTE B. KINNEY AND CLESSON S. KINNEY, APPELLANTS,

vs.

THE COLUMBIA SAVINGS AND LOAN ASSOCIATION, APPELLEE.

BRIEF FOR APPELLANTS.

I.

This cause comes here upon the question of jurisdiction alone, duly certified from the Circuit Court, under Section 5 of the act, entitled, "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891.

The case was brought originally in the state court, and being removed in due time to the Circuit Court, the question was made by motion to remand, that the requisite diversity of citizenship at the time of the bringing of the suit, was not disclosed by the petition for removal and record in the state court. The suit was brought by appellants to procure an accounting and the redemption of real property from the lien of a trust deed or mortgage. Complaint was filed August 25, 1899, and summons issued and served. (Record, 1, 7, 8.)

On September 2, 1899, the appellee presented its petition and bond for the removal of the cause to the Circuit Court of the United States for the District of Utah, and, on the same day, the order for removal was made. The transcript of record was filed in the Circuit Court on the 28th day of November, 1899, and in due time. (Record, 9, 10, 71.)

The petition for removal stated: "That the controversy in said suit is between citizens of different States, and that your petitioner, the defendant in the above entitled suit, was at the time of the commencement of this suit and still is a res-

ident and a citizen of the city of Denver and State of Colorado." (Record, 9, 71.)

The bond on removal stated: "That the Columbia Savings and Loan Association, a corporation of Denver, Colorado, as principal," with its surety, made the bond, etc. (Record, 10, 71.)

The original complaint of appellants stated: "That at all times hereinafter mentioned, the defendant was and now is, a corporation organized and existing under the laws of the State of Colorado." (Record, 1, 71.)

As shown by the certificate of the Circuit Court no other fact of or concerning the citizenship or residence of the parties, is stated or set out in the record as made at the time of the removal. (Record, 71.)

If the allegation of the complaint as to the organization and existence of the appellee as a corporation under the laws of Colorado be sufficient to supply the omission of averment in the petition and bond for removal, still, there is nothing in the record anywhere to show the citizenship of the appellants at the time the suit was brought.

Upon the filing of the record in the Circuit Court the appellants entered a motion to remand, because the matter in dispute did not exceed $2,000.00, etc., and, on the same day, appellee filed a pleading designated as an "answer and cross complaint." (Record, 11, 12, 72.)

Afterwards, on the 30th day of December, 1899, appellants entered a motion for leave to amend their motion to remand by "adding thereto as a specific ground for the the remanding of said cause, that the diverse citizenship of the parties at the time of the commencement of the suit and at the time of the removal of the cause from the State court, does not appear upon the record." (Record, 20.)

The order denying the motion was made on January 6, 1900, by Judge Riner (sitting for Judge Marshall), who, at the same time. allowed the appellee to amend its petition for removal and cross complaint by adding statements as to the citizenship of appellants at the time of the bringing of the suit. (Record, 22, 23, 72.)

Afterwards, by leave of the court, appellants made a second motion to remand on the ground that the petition for removal and record did not disclose the diverse citizenship of the parties at the time of the commencement of the suit, and at the time of the removal thereof. (Record, 24, 72.)

The second motion was, on April 23, 1900, denied by the court, Marshall, J., presiding, *solely* because a similar motion had been heard and decided by another judge, "with co-ordinate jurisdiction and powers, holding this court."

Opinion of court and certificate, etc. (Record, 25, 72.)

Thereupon, the pleadings were re-cast and the cause proceeded to final decree, dismissing appellants' bill, and finding for appellee upon its cross bill, etc. (Record, 64, 65.)

At the same term, an appeal was prayed and allowed, upon the sole question of the jurisdiction of the court, and a certificate thereof made, as provided by law. (Record, 67, 68, 70, 71, 72.)

The assignment of errors is based upon the denials by the court of the two motions to remand, the order allowing the amendments to the petition for removal and the cross complaint, and the entry of the decree, because, as alleged, the court had no jurisdiction to hear and determine the cause. (Assignment of Errors, Record, 69, 70.)

The certificate of the jurisdictional question was, by consent, amended so as to show that the appellee gave notice of its motion for leave to amend the petition for removal on the 2d day of January, 1900, and that the proposed amendment was filed on the 3d day of January, 1900, and the motion to remand was argued and submitted on the 4th of January, 1900. (Record, 74, 75.)

The certificate shows all of the foregoing proceedings, and further states: "The case, as made by the complaint, did not in anywise involve the construction or application of the constitution of the United States, and did not draw in question the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, and did not contain any claim that the constitution or any law of any state was in contravention of the constitution of the United States." (Record, 71, 72.)

In Colvin v. Jacksonville, (158 U. S., 459), the Chief Justice observes that the court is confined in the disposition of the cause to the *certificate*. If, by this, it is to be understood that the court will not look outside of the certificate nor to the remainder of the record, there would seem to be no necessity of bringing to this court in this class of cases, the record at large. With no express direction by the court to guide us, however, we have brought up all of the record material to the inquiry. The *certificate* contains, also, a full and complete statement of the proceedings.

II.

The several assignments of error are all directed to the single question of jurisdiction. It is manifest, that when the removal from the state court was had, that court had not lost jurisdiction, and of course the Federal Court had not acquired jurisdiction. Upon the hearing and decision of the first motion to remand, it was sought to deprive the state court of jurisdiction, by amendments to the petition for removal and

the cross complaint first filed in the Circuit Court. Evidently, it was supposed, that by this proceeding the jurisdiction of the cause, which theretofore had remained in the state court, *eo instanti* was devested, and at once vested in the Federal Court.

In view of the express decisions of this court upon such question, the ruling of the court upon the proposed amendments must have been predicated upon the assumption that the allegations in the petition and bond for removal, to the effect that the controversy was between citizens of different states, and that appellee was, at the time suit was brought, a citizen of Colorado, coupled with the allegation of the original complaint that appellee was *organized* and *existing as* a corporation under the laws of that state, were imperfect statements of facts showing a right to the transfer.

There is here, however, a total failure to allege the citizenship of the appellants at the commencement of the suit, and we find no decision of this court that a general allegation of diversity of citizenship at the time removal is sought, is sufficient to devest the State court of its jurisdiction.

As said in Stone v. South Carolina, (117 U. S., 430):

> "A State court is not bound to surrender its jurisdiction of a suit on removal until a case has been made which on its face shows that the petitioner has a right to the transfer."

In Carson v. Dunham, (121 U. S., 421), the petition for removal was based upon diversity of citizenship, which was fully alleged, and upon a Federal question made under the laws of the United States.

In the Circuit Court the question of citizenship was tried and found adversely to the defendant, but, in as much as the cause had been rightfully removed, and the jurisdiction thereof vested in the Circuit Court, it was held that the imperfect statements of the petition as to the other ground of removal, might be expanded and perfected by amendment.

The rule seems to be established that such amendments may be allowed by the Circuit Court when, and when only, the petition for removal as presented to the State court, upon its face, in connection with the remainder of the record made at that time, shows sufficient ground for removal.

> Crehore v. O. & M. R. R. Co., 131 U. S., 240;
> Jackson v. Allen, 132 U. S., 27;
> Martin v. B. & O. R. R. Co., 151 U. S. 691;
> Powers v. C. & O. Ry. Co., 169 U. S., 101.

Upon the question of jurisdiction made here, and the duty of the Circuit Court to decline jurisdiction at any time,

notwithstanding a prior order in the premises, we rely upon the uniform decisions of this court.

Stevens v. Nichols, 130 U. S., 230;
Glashill v. N. P. Ry. Co., 144 U. S., 211;
U. P. R. R. Co. v. Fitzgerald, 160 U. S., 580,
La Confiance Compagnie, etc., v. Hall, 137 U. S., 61;
Kellam v. Keith, 144 U. S., 569;
Mattingly v. R. R. Co., 158 U. S., 53.

And at the Circuit:

Dalton v. M. M. Ins. Co., 118 Fed., 876.

The appellants, who were defendants in the cross bill, objected to the jurisdiction from the beginning, while the appellee, plaintiff in the cross bill, insisted upon the court taking jurisdiction. Judgment on the merits was rendered in favor of the plaintiff in the cross bill.

The case then is within subdivision three of the rule as to the appellate jurisdiction, announced in United States v. Jahn, (155 U. S., 115).

The case should be reversed, with directions to remand to the State court.

Respectfully submitted,

CHARLES S. VARIAN,
For Appellants.

FRANKLIN S. RICHARDS,
Of Counsel.

FILE COPY.

Supreme Court of the United States

OCTOBER TERM.

Office Supreme Court U. S.
FILED
MAY 11 1903
JAMES H. McKENNEY,
Clerk

No. 102.

ANTOINETTE B. KINNEY AND CLESSON S. KINNEY,
APPELLANTS,

vs.

THE COLUMBIA SAVINGS AND LOAN ASSOCIATION,
APPELLEE.

BRIEF FOR APPELLEE.

J. NORMAN,
For Appellee.

Supreme Court of the United States

OCTOBER TERM.

No. 398.

ANTOINETTE B. KINNEY AND CLESSON S. KINNEY,
APPELLANTS,

vs.

THE COLUMBIA SAVINGS AND LOAN ASSOCIATION,
APPELLEE.

BRIEF FOR APPELLEE.

STATEMENT OF CASE.

This suit was originally brought in the State Court of the Third Judicial District of the state of Utah. In due time, on, to wit, September 2, 1899, the following petition for removal was filed:

"PETITION FOR REMOVAL.

To the Honorable District Court of the Third Judicial District in and for the county of Salt Lake and state of Utah:

Your petitioner, The Columbia Savings and Loan Association, respectfully shows to this Honorable court that the matter and amount in dispute in the above entitled suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

That the controversy in said suit is between citizens of different states, and that your petitioner, the defendant in the above entitled suit, was, at the time of the commencement of the suit, and still is, a resident and a citizen of the city of Denver and state of Colorado.

And your petitioner offers herewith a good and sufficient surety for its entering in the Circuit Court of the United States for the district of Utah, on the first day of next session, a copy of the record of this suit, and for paying all costs that may be awarded by said Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And it prays this Honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed to said Circuit Court of the United States in and for the district of Utah, and it will ever pray.

COLUMBIA SAVINGS & LOAN ASSOCIATION.

(Seal.) T. J. ZOLLARS, President."

STATE OF COLORADO, COUNTY OF SALT LAKE, SS.

T. J. Zollars deposes and says: I am president of the above-named petitioner. The foregoing petition is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to these matters—it to be true.

T. J. ZOLLARS.

Subscribed and sworn to before me this 30th day of August, A. D. 1899.

LUCY J. DILLINGHAM,
Notary Public,
Arapahoe County, Colorado.

J. NORMAN,
STEPHENS & SMITH,
Petitioner's Attorneys."

On the same day appellee filed a good and sufficient bond on removal. (Record, page 10.)

On November 28, 1899, appellants filed their motion to remand this cause to the District Court of the Third Judicial District of the state of Utah, on the ground that the court was without jurisdiction because the amount in dispute did not exceed the sum of two thousand dollars, exclusive of interest and costs. ((Record, page 11.)

On November 28, 1899, appellee filed its answer and cross-complaint. (Record, page 12.)

On December 30, 1899, appellants entered a motion for leave to amend their motion to remand by adding thereto as a specific ground for the remanding of said cause that the diverse citizenship, at the time of the commencement of this action and at the time of

the removal of the same from the state court, did not appear upon the record. (Record, page 20.)

On January 2, 1900, appellee filed a motion to amend its answer and cross-complaint. (Record, page 20.)

Afterwards, on January 3d, appellee filed notice of motion to amend its petition for removal, so that said petition would show more specifically the citizenship of appellants. (Record, page 21.)

Afterwards, on January 4, 1900, after argument by counsel, the court took the motion to remand under advisement. (Record, pages 21 and 22.)

And on January 6, 1900, the court granted the motion of appellee to amend its petition for removal (Record, page 22), and appellee thereupon filed the following as its amended petition for removal:

"AMENDED PETITION FOR REMOVAL.

To the Honorable District Court of the Third Judicial District in and for the county of Salt Lake and state of Utah:

Your petitioner, The Columbia Savings and Loan Association (formerly The Columbia Building and Loan Association), a corporation, and defendant in the above entitled action, and leave of court being first duly had, hereby files its amended petition for removal, and respectfully shows to this Honorable court that the matter and amount in dispute, in the above entitled suit, exceeds, exclusive of interest and costs, the sum or value of $2,000.00.

That the controversy in said suit is between citizens of different states, and that your petitioner, the defendant in the above entitled suit, was, at the time

of the commencement of said suit, ever since has been, and still is, a citizen and resident of the city of Denver and state of Colorado.

And that the plaintiffs in said suit, Antoinette B. Kinney and Clesson S. Kinney, and each of them, were, at the time of the commencement of this suit, ever since have been and still are, citizens and residents of Salt Lake City and state of Utah.

And your petitioner offers herewith a good and sufficient surety for its entering in the Circuit Court of the United States for the district of Utah, upon the first day of its next session, a copy of the record of this suit, and for paying all costs that may be awarded by said Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And defendant prays this Honorable court to proceed no further herein except to make the order of removal required by law, and to accept the said surety and bond, and to cause the records herein to be removed to said Circuit Court of the United States in and for the district of Utah, and it will ever pray.

THE COLUMBIA SAVINGS & LOAN ASSOCIATION,

By J. NORMAN, its Vice-President.

STATE OF UTAH, COUNTY OF SALT LAKE, ss.

J. Norman, being first duly sworn, on oath deposes and says: That he is the vice-president of the above named defendant, The Columbia Savings and Loan Association; that he has read the foregoing petition for removal, and knows the contents thereof, and knows of his own knowledge that the matters therein stated are true, except as to those matters

therein stated upon information and belief, and as to such that he believes them to be true.

J. NORMAN.

Subscribed and sworn to before me this 6th day of January, A. D. 1900.

BENNER X. SMITH,
(Seal.) Notary Public."

Afterwards, on January 6, 1900, the court denied the motion of appellants to remand this cause to the state court. (Record, page 22.)

On January 6, 1900, appellee filed the following amendment to its answer:

"AMENDMENT TO DEFENDANT'S ANSWER AND CROSS-COMPLAINT.

Comes now the defendant, The Columbia Savings & Loan Association, a corporation of the state of Colorado, after leave of court first duly had, and hereby amends paragraphs first and second of its answer and cross-complaint, upon pages five and six thereof, so that said paragraphs first and second shall now read as follows:

First. That your orator, at the time of the commencement of this suit, was and ever since then, and now is, a corporation organized and existing under and by virtue of the laws of the state of Colorado, and a citizen and resident of the city of Denver and state of Colorado, and that the plaintiffs, Antoinette B. Kinney and Clesson S. Kinney, at the time of the commencement of this suit, were, and ever since have been, and still are, citizens of the state of Utah, and resi-

dents thereof, residing at the city of Salt Lake, in the said state of Utah.

Second. Your orator further avers that this is a controversy between citizens of different states, and that more than $2,000.00, exclusive of interest and costs, is involved therein.

(Signed) STEPHENS & SMITH,
Solicitors for Defendant.

STATE OF UTAH, COUNTY OF SALT LAKE, ss.

J. Norman, being first duly sworn, on oath, deposes and says: That he is the vice-president of the defendant corporation; that he has read the foregoing amendment to defendant's answer and cross-complaint and knows the contents thereof, and knows of his own knowledge that the matters therein stated are true, except as to those matters therein stated upon information and belief, and as to such that he believes them to be true.

(Signed) J. NORMAN.

Subscribed and sworn to before me this 2d day of January, A. D. 1900.

(Signed) BENNER X. SMITH,
(Seal) Notary Public."
(Record, page 23.)

On January 24, 1900, appellants filed a motion to renew their motion to amend, and on April 23, 1900, the court denied this motion. (Record, pages 24 and 25.)

Thereupon the pleadings were re-cast and the cause proceeded to final decree, dismissing the appellant's bill and finding for appellee upon its cross-bill. (Record, pages 64 to 67.)

ARGUMENT.

The only question involved in this appeal is, whether the allowance of an amendment to the petition for removal was authorized.

The suit was removed to the federal court upon the petition of the defendant, which stated as grounds for removal that the amount in dispute, exclusive of interest and costs, exceeded two thousand dollars ($2,000), and "that the controversy in said suit is between citizens of different states, and that your petitioner, the defendant in the above entitled suit, was, at the commencement of the suit, and still is, a resident and citizen of Denver and state of Colorado."

It will be observed that the further formal and particular statement, that the plaintiffs, at the time of the commencement of this suit, ever since have been, and now are, citizens of the state of Utah, was omitted, this being the matter supplied by the amendment.

The petition having been founded upon the diversity of the citizenship of plaintiffs and defendant, and that fact being stated, sufficient was averred to give the federal court jurisdiction, and to authorize an amendment supply the formal and particular averments as to the citizenship of the plaintiffs.

> Stadlemann vs. White Line Towing Co., 92 Fed., 209.
>
> Johnson vs. F. C. Austin Mfg. Co., 76 Fed., 616.

In each of these cases the objection was to the failure to state the citizenship of the plaintiff at the

time of the commencement of the action, the same as in this case. There having been the general averment that the controversy was between citizens of different states, the court, in the Johnson case, by Foster, J., recognizing the ruling of this court that, where there is a want of jurisdictional averment in the record, the federal court does not obtain jurisdiction, and there can be no amendment, citing Crehore vs. Railroad Co., 131 U. S., 242; Jackson vs. Allen, 132 U. S., 27, and Stevens vs. Nichols, 130 U. S., 230, said:

> "Here is a general averment that the controversy is between citizens of different states, which is the ground upon which jurisdiction is sought to be conferred upon this court, and yet that averment is not sufficiently specific, but should be followed with the further statement showing the particular state of which each party to the litigation is a citizen. I am of opinion, however, that the general averment, that the controversy is between citizens of different states, is sufficient, under the rule established in 121 U. S., 427 (Carson vs. Dunham), to justify this court in permitting the amendment asked for."

In the Stadlemann case the court, per Lochren, J., says:

> "If the petition had failed to contain jurisdictional averments, this court would not obtain jurisdiction, and no amendment could be allowed. But it does contain the averments that the controversy is between

citizens of the different states, and that the amount in controversy, exclusive of interest and costs, exceeds the sum of $2,000. These are the facts upon which the jurisdiction of this court depends. Yet the averment that the controversy is between citizens of different states is not sufficiently specific, but should be followed by the further statement of the particular state of which each of the parties is a citizen. Such specific statement is made as to the citizenship of the defendant, but not as to the citizenship of the plaintiff; and it is to remedy this want of specific statement that the leave to amend is sought. The fact, sought to be averred by the proposed amendment, that the plaintiff is a citizen of the state of Wisconsin, is an immaterial fact, except as it is a statement in detail of one of the facts necessary to complete with requisite certainty the statement of the ultimate and material fact (which is alleged) that the controversy is between citizens of different states. The proposed amendment, therefore, does no more than set forth in proper form, and with sufficient fullness of detail, what had originally been imperfectly stated in the petition."

The right to amend is recognized by the decisions of this court. In Powers vs. Chesapeake & Ohio Ry., 169 U. S., 92, 101, it is said:

"But if, upon the face of the petition and of the whole record of the state court,

> sufficient grounds for removal are shown, the petition may be amended in the Circuit Court of the United States, by leave of that court, by stating more fully and distinctly the facts which support those grounds."

Citing:

> Carson vs. Dunham, 121 U. S., 421, 427, and Martin vs. Baltimore & Ohio Railroad, 151 U. S., 673, 690, 691.

The grounds for removal in the case at bar were that more than $2,000 was in controversy between citizens of different states. The averment of these facts gave the court jurisdiction; and the averment that plaintiffs and defendant were at the time of the commencement of the suit, ever since have been, and now are, citizens, etc., is simply "stating more fully and distinctly the facts which support" the ground of diverse citizenship. In other words, to the general averment is added the necessary particulars.

An amendment being permitted "stating more fully and distinctly the facts which support" the grounds for removal, the grounds for removal being jurisdictional, must permit the addition of some necessary jurisdictional fact that does not appear in the record. Unless the omitted fact be necessary, it will not be permitted to be brought into the record, for courts will not require nor permit the doing of a useless and unnecessary act. If the fact already appears in the record, its repetition in the petition would be an act of supererogation and a useless extension of the record, for "the requirements of the law are met if the citizenship of the parties to the controversy

sought to be removed is shown affirmatively by the record of the case." Steamship Company vs. Tugman, 106 U. S., 118, 122, citing Railway Company vs. Ramsey, 22 Wall., 322, and Roberts vs. Cease, 97 U. S., 646. And where the removal is upon a single ground, e. g., diverse citizenship, the right of amendment goes for nothing unless a necessary and material fact, not appearing in the record, may be supplied.

In conclusion, we submit that, where the requisite grounds for removal have been set forth, but not with sufficient fullness and particularity, the omitted particulars may be supplied by amendment; that the requisite grounds are sufficiently set forth to give the court jurisdiction to permit an amendment supplying the omitted particulars that the plaintiffs were, at the time of the commencement of this suit and still are, citizens and residents of the state of Utah, where the petition in the first instance averred that the amount in dispute, exclusive of interest and costs, exceeds the value of two thousand dollars ($2,000); that the controversy is between citizens of different states, and that defendant was, at the time of the commencement of said suit, and still is, a citizen and resident of the state of Colorado, as maintained in the Stadlemann and Johnson cases, supra, and that the right of amendment recognized in the Powers case, supra, can not otherwise be made effective.

Respectfully submitted,

J. NORMAN,
For Appellee.

Supreme Court of the United States.

No. 102.—October Term, 1903.

Antoinette B. Kinney and Clesson S. Kinney, Appellants, *vs.* The Columbia Savings and Loan Association.	Appeal from the Circuit Court of the United States for the District of Utah.

[November 9, 1903.]

On August 25, 1899, appellants commenced this suit in the District Court of Salt Lake County, Utah. By it plaintiffs sought an accounting and the cancellation of a deed of trust executed by them to a trustee for the benefit of the defendant. The complaint alleged that "the defendant was and now is a corporation organized and existing under the laws of the State of Colorado." The deed of trust (copied in the complaint) was executed November 22, 1890, and purports to be "between Antoinette B. Kinney and Clesson S. Kinney, her husband, of the county of Salt Lake and Territory of Utah, parties of the first part; and Clyde J. Eastman" named as trustee. It was executed before a notary public in Salt Lake County.

On September 2, 1899, the defendant filed a petition and bond for removal to the Circuit Court of the United States for the District of Utah. That petition alleged:

"Your petitioner, The Columbia Savings and Loan Association, respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

"That the controversy in said suit is between citizens of different States, and that your petitioner, the defendant in the above-entitled suit, was, at the time of the commencement of the suit, and still is, a resident and a citizen of the city of Denver and State of Colorado."

On November 28, 1899, the plaintiffs filed a motion to remand the cause to the State court on the ground, that "the amount or matter in dispute therein does not, and at the time said cause was removed from the State court, did not, exceed the sum or value of $2,000, exclusive of interest and cost." On the same day the defendant filed in the Circuit Court an answer and cross complaint, by the latter seeking a foreclosure of the trust deed. In the cross complaint it alleged "that it is a corporation, organized and existing under the laws of the State of Colorado, and is a citizen of said State, and that complainants herein are citizens and residents of Salt Lake City, State of Utah."

On December 30, 1899, the plaintiffs gave notice of a motion to amend their motion to remand, by adding as a further ground "that the diverse citizenship of the parties at the time of the commencement of the suit, and at the time of the removal of said cause from the State court, does not appear upon the record."

On January 2, 1900, the defendant gave notice of a motion to amend the paragraph hereinbefore quoted from its cross complaint to read as follows:

"First. That your orator, at the time of the commencement of this suit, was and ever since then, and now is, a corporation organized and existing under and by virtue of the laws of the State of Colorado, and a citizen and resident of the city of Denver and State of Colorado, and that the said plaintiffs, Antoinette B. Kinney and Clesson S. Kinney, at the time of the commencement of this suit, were, and ever since have been, and still are, citizens of the State of Utah, and residents thereof, residing at the city of Salt Lake in the said State of Utah."

And also notice of a motion to amend the petition for removal by adding this allegation:

"That the plaintiffs, Antoinette B. Kinney and Clesson S. Kinney, and each of them, were, at the time of the commencement of this suit, and still are, citizens and residents of the city of Salt Lake and State of Utah."

On January 6, 1900, the motion to remand was denied, and leave given to amend the petition for removal and the cross complaint. Subsequently the case went to trial in the Circuit Court and a decree was rendered in favor of the defendant for the recovery of $4,003.45 and the foreclosure of the trust deed. From such decree an appeal was allowed to this court upon the single question of jurisdiction.

Mr. Justice BREWER delivered the opinion of the Court.

Had the Federal court the power to permit the amendment of the petition for removal? The suit was removable. Diverse citizenship in fact existed and the amount in controversy was over $2,000. The right to remove existed, but the petition for removal was defective. If it had been sufficient there would have been no need of amendment. The question is whether it was so defective as to be incurable. In other words, was the case one in which the court had power to permit the facts to be stated in order to secure to the defendant the removal to which it had a right? By section 1 of chap. 866, (25 Stat. 434,) jurisdiction is given to the Circuit Courts of all suits of a civil nature "where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000," and "in which there shall be a controversy between citizens of different States." By section 2 of the same act any such suit pending in a State court may be removed into the Circuit Court of the United States by the defendant or defendants if non-residents. The petition for removal, which was duly

verified, alleged the existence of just such a suit. True, this court, construing the statute, has held that the difference of citizenship must exist both at the commencement of the suit and at the filing of the petition for removal. (*Gibson* v. *Bruce*, 108 U. S. 561; *Akers* v. *Akers*, 117 U. S. 197; *Stevens* v. *Nichols*, 130 U. S. 230.) But this does not change the fact that the language of the petition follows that of the statute in stating the existence of that which the statute makes the basis of a right of removal.

It is also true that when a record presented to this court fails to show a diversity of citizenship, both when the suit was commenced and when the petition for removal was filed, a reversal has been ordered and the case sent back to the Circuit Court with directions to remand to the State court. (*Stevens* v. *Nichols*, *supra*; *Crehore* v. *Ohio &c. Ry. Co.*, 131 U. S. 240; *Jackson* v. *Allen*, 132 U. S. 27; *La Confiance Compagnie Anonyme d'Assurance* v. *Hall*, 137 U. S. 61; *Kellam* v. *Keith*, 144 U. S. 568; *Mattingly* v. *N. W. Va. R. R. Co.*, 158 U. S. 53.) In none of these cases does it appear that the defect was noticed in the Circuit Court, and in some not noticed by the parties after the case had reached this court, but action was taken here by virtue of the duty resting on all Federal courts not to entertain jurisdiction, if it does not affirmatively appear. It is also true that in *Crehore* v. *Ohio &c. Ry. Co.*, *supra*, this court was asked to grant leave to the Circuit Court to permit an amendment of the defective removal proceedings, and the application was denied, but that was after the case had been finally disposed of in the Circuit Court and the insufficiency of the removal papers had been declared by this. Here the application was made shortly after the filing of the removal papers and before any action had been taken in the Circuit Court. The amendment was allowed by the Circuit Court, and the question now to determine is whether that court had power to permit such amendment. It is frequently stated that amendments are within the discretion of the trial court, and that unless it appears that the discretion has been abused no error is shown.

A petition and bond for removal are in the nature of process. They constitute the process by which the case is transferred from the State to the Federal court. Congress has made ample provision for the amendment of process. Section 948 reads:

"Any Circuit or District Court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced and the amendment will not injure the party against whom such process issues."

And by section 954 it is provided that—

"No summons, writ, declaration, return, process, judgment or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed or reversed for any defect or want of form, . . . and

may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

The question of the power of amendment has been decided by this court in several cases. In *Parker* v. *Overman*, (18 How. 137,) a petition for removal was defective in that it simply alleged residence and not citizenship, but was corrected, over objection, by amendment in the Federal court, and, as said by Mr. Justice Grier (p. 141):

"In the petition to remove this case from the State court there was not a proper averment as to the citizenship of the plaintiff in error. It alleged that Parker 'resided' in Tennessee and White in Maryland. 'Citizenship' and 'residence' are not synonymous terms; but as the record was afterwards so amended as to show conclusively the citizenship of the parties, the court below had, and this court has, undoubted jurisdiction of the case."

In *Carson* v. *Dunham*, (121 U. S. 421,) the application for removal was based on two grounds: One, diverse citizenship, and the other, the existence of a Federal question. The allegation in respect to the Federal question was general, and did not state the facts. After the case had been entered in the Federal court an answer was filed, stating more fully the facts upon which the existence of a Federal question was based. Mr. Chief Justice Waite, speaking for the court, said, in reference to this answer:

"The answer was filed, which, for the purposes of jurisdiction, may fairly be treated as an amendment to the petition for removal, setting forth the facts from which the conclusions there stated were drawn. As an amendment, the answer was germaine to the petition, and did no more than set forth in proper form what had before been imperfectly stated."

It is true that this court, on examination of the record, found that no Federal question was even then disclosed, but that does not alter the ruling that an amendment was proper showing the facts upon which the general averment of a Federal question was based. *Grace* v. *American Central Insurance Company*, (109 U. S. 278, 285,) seems to recognize the right of amendment. The same may be said of *Thayer* v. *Life Association*, (112 U. S. 717, 720.) *Robertson* v. *Cease*, (97 U. S. 646,) was a suit originally commenced in the United States Circuit Court. It failed to allege diverse citizenship, but no objection was made in the court below on that ground, and while this court reversed the judgment, it sent the case back with leave to amend the petition in respect to the allegation of citizenship. The case relied upon in the opinion was *Morgan's Executor* v. *Gay*, (19 Wall. 81,) in which the same ruling had been made. These cases recognize the power of the Circuit Court to permit amendment of pleadings to show diverse citizenship and of removal proceedings where there is a technical defect and there are averments sufficient to show jurisdiction.

The facts here disclosed clearly show a case in which an amendment was rightfully made. The citizenship of the defendant, both at the time the suit was commenced and when the petition for removal was filed, was clearly and positively stated. There was a general averment that it was a case of diverse citizenship, and, therefore, one in which by the statute the party was entitled to a removal. The trust deed, which was the subject matter of the controversy, showed upon its face that the plaintiffs were of Salt Lake County, and was executed before a notary public in that county. The continuance of that situation is to be presumed. The first action taken by the plaintiffs after the removal was a motion to remand, based not on account of any defect in the averments of citizenship but simply in respect to the amount in controversy. A month after filing this motion they sought to amend it by including an objection on account of a defect in the allegations of diverse citizenship, and immediately thereafter the defendant moved to amend the petition for removal so as to make it sufficient in that respect. All these things took place before any action had been had in the Federal court on the merits of the case. It may also be noticed that the State court apparently recognized the removal proceedings as sufficient, for it took no further steps in the case, and hence we need not inquire what would have been the effect of any action taken by it in disregard of the removal. Clearly the plaintiffs were not prejudiced. The case was one which the appellee had a right to remove, and nothing had been done to prejudice the rights of the plaintiffs before the petition for removal was perfected. It seems to us, therefore, that this is a case in which the amendment was properly allowed.

The decree of the Circuit Court will be *Affirmed.*

True copy.

Test:

Clerk Supreme Court, U. S.